85-811

No.....

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1985

JOHN L. WILSON and ROBERTA L. WILSON,
Husband and Wife

Petitioners,

vs.

SEARS, ROEBUCK AND CO.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

1. Whether, in a diversity action, a judgment notwithstanding the verdict and order of dismissal based upon an interpretation of state substantive law should be re-examined or reversed when such interpretation has subsequently been rendered invalid by that state's highest court.

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CITATIONS TO THE OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals, No. 84-1314, 757 F.2d 948 (8th Cir. March 20, 1985), appears as Appendix A. The opinion of the United States District Court for Nebraska, No. CV80-0-117, slip opinion, (D.Neb. February 6, 1984), appears as Appendix B. The relevant portion of the opinion and decision of the Supreme Court of Nebraska in *James v. Lieb*, 221 Neb. 47, — N.W.2d — (October 25, 1985), appears as Appendix E.

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JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on March 20, 1985. A Petition for Rehearing was timely filed and the Court of Appeals entered an order on August 14, 1985, denying the Petition for Rehearing, denying the Petitioner's Motion to certify the issue presented in the appeal to the Nebraska Supreme Court, and denying motion for leave to file a brief amicus curiae by the Nebraska Association of Trial Attorneys. This Petition for Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1).

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STATUTES INVOLVED

28 U.S.C. Sec. 1652:

"The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

STATEMENT OF THE CASE

Petitioners were patrons in a restaurant in Omaha, Nebraska, on November 26, 1977, when they came to be in or near the line of fire of a person discharging several rounds from a 12-gauge shotgun. Though not struck by any projectiles from the weapon, Petitioner John Wilson experienced a percussion blast and Roberta was hit by flying debris. Each Petitioner suffered extreme emotional disturbance, resulting in a diagnosis of post-traumatic stress disorder, by reason of being placed in fear for their safety.

This diversity action was brought by Petitioners, Nebraska citizens, against Sears Roebuck and Company, Respondent, a Delaware Corporation, alleging that Sears was negligent in selling and entrusting the shotgun to a mentally unstable and dangerous individual. The matter proceeded to trial before a jury, which, on December 14, 1983, rendered a verdict in favor of each Petitioner, $75,000.00 for John L. Wilson and $10,000.00 for Roberta L. Wilson. The verdict was entered by the Clerk on December 21, 1983. On December 23, Respondent filed a Motion for Entry of Judgment notwithstanding the verdict and on February 6, 1984, the Trial Court granted said Motion and dismissed the Complaint of the Petitioners. The Trial Court's ruling was based upon the Court's view that, according to Nebraska substantive law, recovery for negligent infliction of emotional disturbance requires proof of "physical injury," citing *Fournell v. Usher Pest Control*, 208 Neb. 684, 305 N.W.2d 605 (1981) (App. B).

Although Petitioners argued the jury was properly instructed regarding the definition of a "physical injury"

(i.e. a condition or illness susceptible of objective determination), and by its verdict so found, the Trial Court viewed the facts otherwise.

Thereafter, Petitioners perfected their appeal to the Court below on the ground that sufficient evidence of "physical injury" was introduced at trial and that Petitioners' verdict should be reinstated. Further, Petitioners argued that the supposed requirement of "physical injury" in *Fournell* was mere dicta and not a part of the holding of the Nebraska court. In its decision filed March 20, 1985, the Court found that "whether or not the majority's statements regarding the injury issue were an alternate holding or merely dicta, they provided a basis for the district court there to conclude that the State's highest court requires physical injury and that emotional disturbance and distress alone are not sufficient to establish a right to recover. Our function in this diversity case is to determine whether the district court erred in its determination of a state law question. While we entertain the view that the dissenting opinion of *Fournell* is far more persuasive than the majority opinion, it is our duty, as well as the district court's, to follow the court's decision, which is that of a majority of its judges" (App. A).

Petitioners thereafter filed their Motion requesting, in the alternative, a rehearing, or a certification of the issue presented to the Nebraska Supreme Court, which Motion was joined by a Motion for Leave to File a Brief Amicus Curiae of the Nebraska Association of Trial Attorneys. All of said Motions were denied by Order of the Court dated August 14, 1985 (App. D).

Subsequently, however, on October 25, 1985, the Nebraska Supreme Court did in fact render a decision which

clarified the Nebraska State substantive law on the precise issue presented to the Court below by abrogating the "physical injury" requirement for recovery for the negligent infliction of emotional trauma.

This case is now before this Court on the conflict between the lower courts' interpretation of Nebraska substantive law and the actual statement thereof by the highest court of that state.

REASONS FOR GRANTING THE WRIT

The Decision Below Is In Irreconcilable Conflict With A Subsequent Decision Of The State's Highest Court On A Substantive Law Question. This Conflict Constitutes Such A Departure From The Accepted And Usual Course Of Judicial Proceedings As To Call For An Exercise Of This Court's Power Of Supervision.

The decision of the Eighth Circuit Court of Appeals in this case is clearly based upon an interpretation of Nebraska substantive law that evidence of physical injury is a necessary prerequisite to recovery for the negligent infliction of emotional distress. It could hardly be argued otherwise. The Court:

> "Whether or not the majority's statements regarding the injury issue were an alternate holding or merely dicta, they provided a basis for the district court to conclude that the state's highest court requires physical injury and that emotional disturbance and distress alone are not sufficient to establish a right to recover. . . . The district court did not err in concluding that *Fournell* disallows recovery for mental and emotional disturbances and stress alone and that this was the

extent of injuries that the Wilsons had proven. The judgment of the district court is affirmed." *Wilson v. Sears*, 757 F.2d 948 (8th Cir. 1985), at pp. 951 and 953.

Further, this decision was in affirmance of that of the Trial Court, whose memorandum also explained this view as the basis for the grant of judgment notwithstanding the verdict and dismissal of the Petitioners' complaint. The Trial Court:

> "Damages for negligent infliction of emotional distress are only recoverable when such distress results in physical injury manifested by objective symptomatology. . . . While the court will concede that the plaintiffs suffered severe emotional disturbance while present at or as an immediate result of the Club 89 shooting, we find that their injuries are not of the type susceptible of objective determination." *Wilson v. Sears*, No. CV80-0-117 (D Neb. 1984), see App. 13 of slip opinion.

It is equally clear that the requirement (of evidence of physical injury) on which the decisions of both lower courts were based is abolished by the Nebraska Supreme Court, Nebraska's highest court. See *John Lee James, et al. v. John Milton Lieb, et al.*, 221 Neb. 47, — N.W.2d —, (October 25, 1985), in which the Court held:

> "Before concluding, *we must also address the further requirement of a cause of action for emotional distress in Fournell v. Usher Pest Control Co.*, 208 Neb. 684, 305 N.W.2d 605 (1981), *that plaintiff must evidence some concurrent physical injury resulting from the emotional trauma.* Other courts adopting the *Dillion* approach, to a certain degree, have retained this feature of the zone of danger rule. See, e.g., *Ramirez v. Armstrong*, supra; *Barnhill v. Davis*, 300 N.W.2d 104 (Iowa 1981); *Corso v. Merrill*, 119 N.H. 647, 406 A.2d 300 (1979). *We now reject this require-*

> *ment* for many of the reasons stated in the Chief Justice's dissent on *Fournell,* supra at 697, 305 N.W.2d at 611: To . . . require that, before one who is mentally injured may recover, he must at least regurgitate once seems . . . to be imposing upon the law a requirement that makes little or no sense.'" Id. at p. 58. (Emphasis added.)

It must be pointed out that the Nebraska decision was rendered after the circuit court's order denying Petitioners' Motion for Rehearing (August 14, 1985). Nevertheless, and though Petitioners remain convinced that the Trial Court usurped the function of the jury in substituting its own finding of fact for a verdict based upon "substantial evidence," Petitioners respectfully submit that all such questions are now moot and that Petitioners must be restored to their jury verdict.

It was long been the rule of this Court that:

> ". . . a judgment of a federal court ruled by state law and correctly applying that law as authoritatively declared by the state courts when the judgment was rendered, must be reversed on appellate review if in the meantime the state courts have disapproved of their former rulings and adopted different ones." *Huddleston, et al. v. Dwyer, et al.,* 322 U.S. 232, 236, 64 S.Ct. 1015, 1018, 88 L.Ed. 1246 (1944).

This rule resulted from the incorporation in the landmark case of *Erie R.Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, of the doctrine espoused by Chief Justice Marshall in the case of *United States v. The Schooner Peggy,* 5 U.S. 103, 1 Cranch 103, 2 L.Ed. 49 (1801), as indicated in *Vanderbark v. Owens-Illinois Glass Co.,* 311 U.S. 538, 61 S.Ct. 347, 85 L.Ed. 327 (1941). The Court in *Vanderbark,* supra, also stated, at 542, that:

> "the dominant principle is that nisi prius and appellant tribunals alike should conform their orders to

> the state law as of the time of the entry. Intervening and conflicting decisions will thus cause the reversal of judgments which were correct when entered."

The circumstances of this case before this Court warrant the application of the above principle to resolve the irreconcilable differences and call for the exercise of this Court's supervisory powers to correct the record as it presently stands.

Review Of This Court Is Necessary To Bring About Compliance Between The Existing Determination By The Eighth Circuit Court Of Appeals Of Nebraska Substantive State Law And The Intent Of The Rules Of Decision Act (28 U.S.C. Sec. 1652) And To Provide For An Orderly Judicial Administration Of State Law In The Federal Courts.

28 U.S.C. Sec. 1652, the Rules of Decision Act, requires the courts of the United States to apply the laws of a state in civil actions of the type before this Court. Under the circumstances of the Nebraska Supreme Court clarifying and confirming the substantive state law in question, it is apparent that the application by the Court below of its interpretation of the same substantive state law, which is contrary to the existing interpretation by the Nebraska Supreme Court, results in a disapplication of state law contrary to the intent and purpose of 28 U.S.C. Sec. 1652. This Court has pointed out the importance of the orderly judicial administration of state laws in the federal courts, *Huddleston,* supra, at 237. Furthermore, as this Court has stated in *Vandenbark,* supra, at 543:

> ". . . we are of the view that, until such time as a case is no longer sub judice, the *duty rests upon federal courts* to apply state law under the Rules of Decision statute in accordance with the then controlling

> decision of the highest state court. Any other conclusion would but perpetuate the confusion and injustices arising from inconsistent federal and state interpretations of state law." (Emphasis added).

As a matter of judicial clarity, certainty, and conformity, this matter begs for appropriate review by this Court.

Review By This Court Is Necessary As This Court Can Provide The Only Available Remedy To Insure Equal Application Of Present And Existing State Law In The State Courts And In The Federal Courts In Nebraska.

This matter involves a case of exceptional circumstance which can only be appropriately resolved by this Court. It should further be noted that this case is a matter of considerable public importance, as is evidenced by the Nebraska Association of Trial Attorneys interest in becoming, and attempt to enter, as amicus curiae before the Eighth Circuit Court of Appeals. The Petitioners, recognizing the lack of clarity and obvious confusion with regard to the issue in question and that the Nebraska Supreme Court had not considered the issue for several years prior, sought to have the matter certified to the Supreme Court of Nebraska for a clear and definitive determination of the issues. That request was denied by the Court of Appeals (See Appendix D). While Petitioners recognize that a matter of certification is discretionary, it is apparent that had the Circuit Court of Appeals certified this matter to the Nebraska Supreme Court, the highest state court would have interpreted the law such that the Court of Appeals would have been duty bound to reverse the interpretation of the lower court, thereby avoiding the present conflict in the interpretation of state law. As the

Court of Appeals declined to do so, it would seem incumbent that this Court review and reverse accordingly, to protect judicial integrity, provide fairness in the administration of justice, and rectify the existing conflict.

This Court has on numerous occasions applied the doctrine set forth in *Schooner Peggy,* supra, and *Huddleston,* supra, in the exact or similar circumstances to this case and where the change in law occurred even after the matter was pending on certiorari. See *Dinsmore v. Southern Express Company,* 183 U.S. 115, 22 S.Ct. 45, 46 L.Ed. 111 (1901); *United States v. Alabama,* 362 U.S. 602, 80 S.Ct. 924, 4 L.Ed.2d 982 (1960); *Gulf Offshore Company v. Mobil Oil Corporation,* 453 U.S. 473, 101 S.Ct. 2870, 69 L.Ed.2d 784 (1981); and *Mills v. Rogers,* 457 U.S. 291, 102 S.Ct. 2442, 73 L.Ed.2d 16 (1982).

CONCLUSION

This Court should grant certiorari if for no other reason than to correct the present irreconcilable conflict between state and federal interpretation of the same state substantive law. At present the line of cases in the federal court in Nebraska is in direct conflict with that of the highest state court in Nebraska. Moreover, for reasons heretofore mentioned this Court has consistently imposed a duty upon federal courts to apply to a diversity case the state substantive law as determined by the highest court of the state and to do so even if the state determination occurs after judgment is rendered by the federal court. As this Court has pointed out, such action is necessary as "any other conclusion would but perpetuate the confu-

sion and injustices arising from inconsistent federal and state interpretations of state law." *Vandenbark*, supra, at 543.

It seems most appropriate under the circumstances that this case be considered pursuant to Rule 23 (.1) of the Rules of the Supreme Court for summary reversal on the merits or, at least, for remand to the Eighth Circuit Court of Appeals for further proceedings in light of the holding of the Supreme Court of Nebraska in *James v. Lieb*, supra. Petitioners respectfully pray, therefore, that this Court grant the petition for certiorari to resolve the matters herein.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-1314

Appeal from the United States District Court
for the District of Nebraska

John L. Wilson and Roberta L. Wilson,
Husband and Wife,

Appellants,

v.

Sears, Roebuck and Co., a New York Corporation,

Appellee.

Submitted: October 10, 1984
Filed: March 20, 1985

Before HEANEY, Circuit Judge, HENLEY, Senior Circuit Judge, and JOHN R. GIBSON, Circuit Judge.

JOHN R. GIBSON, Circuit Judge.

The firing of a shotgun into the crowd at a supper club where John and Roberta Wilson were dining gives rise to this diversity action. Although they were not struck by the blasts, the Wilsons saw one member of their party killed and another suffer serious injury. Alleging that this incident caused them to suffer post-traumatic stress disorder, they sued Sears, Roebuck and Co., claiming that it was negligent in selling the gun to the mental patient who fired it in the club. The district court[1] set aside the

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[1]The Honorable C. Arlen Beam, United States District Judge for the District of Nebraska.

verdicts awarding the Wilsons $85,000 and entered judgment notwithstanding the verdict because the Wilsons had not sustained physical injuries susceptible of objective determination. The Wilsons appeal, arguing that the court improperly interpreted Nebraska law. We affirm the judgment of the district court.

On November 26, 1977, John and Roberta Wilson accompanied some friends to the Club 89 restaurant in Omaha. As they waited for a show to begin, Ulysses Cribbs, who had been treated in the Veterans Administration Hospital and diagnosed as a paranoid schizophrenic, began randomly firing at the patrons with a shotgun. John Wilson felt a very hot sensation go by the right side of his face. Roberta Wilson felt something fly into the side of her face and her hand, causing a stinging sensation. John, a police officer, yelled at his wife to give him his gun that she was carrying in her purse. He attempted to fire at Cribbs, but his gun malfunctioned. A companion of the Wilsons', Dennis Lipari, was shot in the face and died later, and Mrs. Lipari was seriously wounded. John began crying and became hysterical. John and Roberta were taken to the hospital, where they were given injections to calm them and released.

Around a week after the incident, John Wilson went to St. Louis for police training. His training officers stated that after his return he became quiet, withdrawn, preoccupied, and "was a different person." Upon returning to Omaha, Wilson was very quiet, withdrawn, and no longer displayed affection. Friends described him as "nervous," "going into a shell," and becoming "completely changed."

Wilson found himself more afraid of guns, violence and dying. While on patrol he would become frightened, breaking into a cold sweat with palitations. He felt that he could no longer perform his duties and resigned his position as a deputy sheriff. He claims to have suffered from nightmares, frequent headaches, dizziness, depression, nervousness, weight loss, and poor appetite.

In September 1979, the Wilsons were evaluated for purposes of this litigation. John was examined by a psychiatrist and a clinical psychologist and was found to suffer from a disorder described as "post-traumatic stress disorder, chronic type." *See generally* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 236-39 (3d ed. 1980). This manual describes the disorder as "the development of characteristic symptoms following a psychologically traumatic event that is generally outside the range of usual human experience." *Id.* at 236. A psychiatrist testified that the condition was directly attributable to the shooting incident. Four years after the shooting, John was treated by an internist and another psychiatrist for severe anxiety, severe depression, chest pains, hypertension, and a hernia. A psychiatrist testified that as a result of the traumatic experience, John Wilson became impaired in his job performance, social performance, and overall ability to function. He is required to take medication to assist him in sleeping and to control dizzy spells, blood pressure, and nervousness. Roberta was diagnosed to have suffered from a mild case of acute post-traumatic stress disorder. She claimed to have lost the affection of her husband as a result of the incident.

The Wilsons filed suit against Sears alleging that it had negligently sold the shotgun to Cribbs. After ver-

dicts for the plaintiffs ($75,000 for John, $10,000 for Roberta), the court granted a motion for a judgment notwithstanding the verdict:

> Damages for negligent infliction of emotional distress are only recoverable when such distress results in physical injury manifested by objective symptomatology. *Fournell v. Usher Pest Control*, 208 Neb. 684, 305 N.W.2d 605 (1981); *Owens v. Childrens Memorial Hospital*, 347 F. Supp. 663 (D. Neb. 1972); *see also Restatement (Second) of Torts* § 436A [1965]. While the Court will concede that the plaintiffs suffered severe emotional disturbance while present at or as an immediate result of the Club 89 shooting, we find that their injuries are not of the type susceptible of objective determination.
>
> Plaintiffs were diagnosed as suffering from post-traumatic stress disorder. Plaintiffs assert that they suffer from a panoply of anxiety-related ailments, including generalized pain, an inability to concentrate, hyperalertness, diminished sensitivity and intermittent sleeplessness. The only particular ailment relating to a specific portion of the body was John Wilson's chest pains. These pains were first exhibited several years after the shooting. Although one of the physicians testifying at trial attributed these pains to "anxiety," there is simply no evidence that adequately links this episode with the post-traumatic stress disorder. In any event, the plaintiffs stated repeatedly that they did not consider the chest pain to be an important factor. They concede that a symptom (chest pain) arising out of another symptom (anxiety) arising out of a traumatic event (the Club 89 occurrences) is not a condition that supports a recovery.
>
> Plaintiffs contend that their relevant symptoms are those of a person suffering from post-traumatic stress disorder, as shown by an authoritative publication, the Diagnostic Statistical Manual (DSM) III.

> They further contend that observation of these anxiety related symptoms by physicians and others provides the objective symptomatology necessary for a recovery of damages. However, the fact that attending physicians and friends hear about and observe an emotional state of mind does not transform such complaints and observations into objective findings of physical injury. The Court finds that, of all the symptoms recited, only the chest pains are susceptible to objective verification. Accordingly, under the facts of this case, the traumatic stress disorder and its various manifestations are not compensable.

Wilson v. Sears, Roebuck & Co., No. CV-80-0-117, slip. op. at 2-4 (D. Neb. Feb. 6, 1984). On appeal, the Wilsons urge that Nebraska law and the evidence presented at trial support a reinstatement of the verdicts.

The district court order concluded that the Wilsons' injuries were not compensable as a matter of Nebraska law because there was no physical injury manifested by objective symptoms. This decision concerning local law in a diversity action is given great weight on appeal. *O'Brien v. Hagen*, 705 F.2d 1001, 1005 (8th Cir. 1983); *Bergstrom v. Sambo's Restaurant, Inc.*, 687 F.2d 1250, 1255 (8th Cir. 1982). In reviewing the order, we look first to *Fournell v. Usher Pest Control*, 208 Neb. 684, 305 N.W. 2d 605 (1981), as it is the latest decision from the Nebraska Supreme Court concerning damages for mental distress.

In *Fournell*, the defendant treated Mrs. Fournell's home for termites. Several months later, she discovered extensive termite damage to the house. One to two months subsequent, she visited a doctor because she cried constantly, was deeply depressed, and could not sleep. She was hospitalized for "reactive depression," and there was

evidence "that her mental and emotional disturbance was caused by the discovery of the termite infestation." 208 Neb. at 686, 305 N.W.2d at 606. The trial court found two elements necessary to recovery: proof that the plaintiff suffered physical injury from emotional traumma, and evidence that the defendant's negligence had placed her in fear of peril for her own safety. The court granted summary judgment for the defendant.

On appeal, the supreme court established two requirements for recovering damages caused by negligently inflicted emotional distress. The plaintiff must have been in the zone of danger created by the defendant's conduct and have suffered "some type of physical injury." 208 Neb. at 687, 305 N.W.2d at 607. The court quoted *Restatement (Second) of Torts* § 436 (1965), which precludes recovery for "emotional disturbance alone, without bodily harm or other compensable damage." It concluded: "[W]hen the termite damage was discovered by the plaintiffs no physical injury resulted to anyone, nor was Susan Fournell placed in fear of bodily harm to herself or anyone else. The plaintiffs' claim for damages here rests on mental and emotional disturbance and distress alone." *Id.* at 687-88, 305 N.W.2d at 607. Alternatively, the court held that as a matter of law the defendant's failure to discover the damage did not place the plaintiffs in a zone of danger. *Id.* at 688, 305 N.W.2d at 607.

The Wilsons urge that the *Fournell* court did not reach the "physical injury" issue and distinguish the case on the ground that Mrs. Fournell was never in physical peril, in contrast to the Wilsons' position in the range of shotgun blasts. The judges dissenting in *Fournell*, however, read the majority opinion to conclude as a matter

of law that "crying, shaking, withdrawing, experiencing depression, and attempting to commit suicide are not sufficiently physical in nature to constitute subsequent physical injury entitling one to recover if believed by a jury." 208 Neb. at 701, 305 N.W.2d at 613 (Krivosha, C.J., dissenting). Whether or not the majority's statements regarding the injury issue were an alternate holding or merely dicta, they provided a basis for the district court to conclude that the state's highest court requires physical injury and that emotional disturbance and distress alone are not sufficient to establish a right to recover. Our function in this diversity case is to determine whether the district court erred in its determination of a state law question. While we entertain the view that the dissenting opinion of *Fournell* is far more persuasive than the majority opinion, it is our duty, as well as the district court's, to follow the court's decision, which is that of a majority of its judges.

Viewing the evidence in a light most favorable to the Wilsons, *see Lackawanna Leather Co. v. Martin & Stewart, Ltd.*, 730 F.2d 1197, 1200 (8th Cir. 1984), the primary "physical injury" demonstrated is John Wilson's chest pains. Wilson's doctor testified that the pains were caused by a hernia and stated the cause of the hernia was unknown. Similarly, the doctor did not link John's hypertension to the shooting incident, for its cause was also unknown. Thus, the district court did not err in ruling that the Wilson's had failed to prove that they sustained physical injury as defined in *Fournell*.[2]

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[2]In *Netusil v. Novak*, 122 Neb. 749, 235 N.W. 335 (1931), the court noted that there is "liability for damages for physical

(Continued on following page)

B.

The Wilsons argue that they should recover because their proof established that the post-traumatic stress disorder is "susceptible of objective determination." Dr. Swanson and Dr. Sletten, psychiatrists, and Dr. Wood, a clinical psychologist, all described the pattern of symptoms of the Wilsons. Dr. Swanson testified that this post-traumatic stress disorder was susceptible of objective determination and his views were mirrored by the others. The district court rejected the Wilson's argument that their mental and emotional disorders provided the objective symptomatology necessary for recovery. It concluded that such evidence of an emotional state did not transform the complaints and observations "into objective findings of physical injury." The Wilsons argue, however, that this evidence made a submissible case under *Owens v. Childrens Memorial Hospital*, 347 F. Supp. 663 (D. Neb. 1972), *aff'd*, 480 F.2d 465 (8th Cir. 1973).

Owens was a diversity action brought by a couple alleging that negligent medical treatment by the defendants resulted in the death of their child, causing them permanent "physical and mental anguish, great emotional dis-

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(Continued from previous page)

injuries which are proximately caused by fright and terror produced by one who owes a legal duty to the one injured." *Id.* at ——, 235 N.W. at 337. The defendant's dog snarled at the plaintiff, but did not bite her. She fainted, and as a "result of the shock received from this attack," suffered from "nervous prostration." After a verdict for the plaintiff, the trial court entered judgment for the defendants because the dog had not bitten the plaintiff. The Supreme Court reversed. The *Novak* court did not squarely address whether "nervous prostration" was a physical injury, but simply assumed that it was. Thus, the case does not support the Wilsons' claims of physical injury.

turbance, shock, and injury to their nervous systems." 347 F. Supp. at 664. The court held that the plaintiffs could not recover under Nebraska law because they had not been in peril. *Id.* at 669. The physical injury issue was never decided. The court observed: "whether the plaintiffs have sustained a definite nervous disorder or pure isolated mental anguish has not yet been proved to this Court." *Id.* at 667. It resolved the impact issue after "assuming that plaintiffs [could] prove that a sufficient physical injury has resulted." *Id.*

In dicta, the *Owens* court observed that "even though Nebraska has abrogated the impact rule, there is still a requirement that some type of 'physical injury' result from the negligently inflicted emotional suffering." *Id.* at 666. Endeavoring to define "physical injury," the court surveyed the law in other jurisdictions:

> The term "physical" is not used in its ordinary sense for purposes of applying the "physical consequences" rule. Rather, the word is used to indicate that the condition or illness for which recovery is sought must be one *susceptible of objective determination.* Hence, a definite nervous disorder is a "physical injury" sufficient to support an action for damages for negligence.

Id. at 667 (emphasis added) (quoting *Petition of United States*, 418 F.2d 264, 269 (1st Cir. 1969) (citations omitted)).[3] No Nebraska law was cited in *Owens* to support Petition's discussion of physical injury.

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[3]*Petition* was an admiralty claim arising from a seaman's psychoneurosis due to immersion in frigid waters after his ship had capsized. The grounding of the vessel was held to be an impact sufficient to satisfy the test applied by jurisdictions following the impact rule. 418 F.2d at 268.

Fournell later cited *Owens* only as recognizing Nebraska law that "there was still a requirement that some type of physical injury result from the negligently inflicted suffering." 208 Neb. at 687, 305 N.W.2d at 607. *Fournell* did not refer to the language from *Owens* discussing the physical injury definition in *Petition*. Moreover, the dissent in *Fournell* also fails to mention *Owens* and its discussion of physical injury. The Wilsons' argument, both to the district court and before us, does not attempt to establish that the evidence proved physical injury, but simply that the evidence of mental and emotional distress was sufficiently objective to recover under *Owens*. As we read *Owens* and *Fournell*, we cannot conclude that the district court erred in requiring proof of physical injury and finding that the evidence had not established such injury.

The district court's instruction,[4] based upon *Owens* reference to *Petition*, may well be contrary to the decision granting judgment notwithstanding the verdict. Nevertheless, we are satisfied that the *Petition* language from *Owens* does not have support in Nebraska law. If there was no submissible issue for jury consideration, a prior inconsistent jury instruction does not prevent the court from correctly ruling the submissibility issue after the verdict. *See Coca Cola Bottling Co. v. Hubbard*, 203 F.2d 859, 862 (8th Cir. 1953) ("[I]n determining whether a trial court has erred in denying a motion for a directed verdict made

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[4][T]o be entitled to damages resulting from an emotional disturbance, the plaintiffs must prove by a preponderance of the evidence that they suffered from some type of physical injury resulting from such emotional disturbance and that said physical injury was a proximate result of defendant's negligence. A physical injury is a condition of illness which is susceptible of objective determination.

at the close of the evidence, it is the applicable law which is controlling, and not what the trial court announced the law to be in his instructions."), *quoted in Hanson v. Ford Motor Co.*, 278 F.2d 586, 593 (8th Cir. 1960) (Blackmun, J.). The district court did not err in concluding that *Fournell* disallows recovery for mental and emotional disturbances and stress alone and that this was the extent of injuries that the Wilsons had proven. The judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JOHN L. WILSON and ROBERTA L. WILSON,

Plaintiffs,

vs.

SEARS, ROEBUCK & COMPANY,

Defendant.

MEMORANDUM AND ORDER

(Filed February 7, 1984)

This matter is before the Court upon defendant's motion for judgment notwithstanding the verdict under *Fed. R. Civ. P.* 50(b) (filing 99). Defendant Sears made a motion for a directed verdict at the close of all the evidence. Such motion was not granted. After the return of verdict and judgment thereon, the defendant submitted filing 99.

Since the jury verdict was in favor of the plaintiffs, the facts will be stated in the light of the evidence and the reasonable inferences derived therefrom most favorable to them. *Garoogian v. Medlock*, 592 F.2d 997 (8th Cir. 1979); *Zoll v. Eastern Allamakee Community School District*, 588 F.2d 246 (8th Cir. 1978).

On the evening of November 26, 1977, Ulysses Cribbs, Jr. entered the Club 89 Restaurant and Lounge located in Omaha, Nebraska, and opened fire on the crowd with a 12-gauge pump shotgun he had purchased from Sears, Roebuck & Company some five weeks earlier. The plaintiffs were present but were not bruised, cut, scraped, or otherwise abraded by the hail of shotgun fire. They did, how-

ever, hear disconcerting sounds and view frightening events including the death of a close friend. Plaintiff John Wilson, an off-duty deputy sheriff, attempted to shoot Cribbs with his service pistol but was unable to do so.

Plaintiffs then brought suit against Sears alleging that Sears acted negligently in selling the gun to Cribbs. The plaintiffs contended that Sears knew or should have known that Cribbs was dangerous with or likely to misuse a firearm. They offered evidence of violation of the terms of a form promulgated pursuant to regulations of the Bureau of Alcohol, Tobacco and Firearms developed under authority of the Gun Control and Safety Act of 1968. 18 U.S.C. § 1926.

Trial commenced in this matter on November 16, 1983, and the jury returned a verdict in favor of the plaintiffs in the amount of $75,000.00 for John Wilson and $10,000.00 for his wife, Roberta. For the reasons set forth below, the Court deems it proper to set aside the jury's verdict.

The Court concludes that even if Sears was negligent, plaintiffs have not suffered damages that are compensable under Nebraska law. Damages for negligent infliction of emotional distress are only recoverable when such distress results in physical injury manifested by objective symptomatology. *Fournell v. Usher Pest Control,* 208 Neb. 684, 305 N.W.2d 605 (1981); *Owens v. Childrens Memorial Hospital,* 347 F. Supp. 663 (D. Neb. 1972); *see also Restatement (Second) of Torts* § 436A. While the Court will concede that the plaintiffs suffered severe emotional disturbance while present at or as an immediate result of the Club 89 shooting, we find that their injuries are not of the type susceptible of objective determination.

Plaintiffs were diagnosed as suffering from post-traumatic stress disorder. Plaintiffs assert that they suffer from a panoply of anxiety-related ailments, including generalized pain, an inability to concentrate, hyperalterness, diminished sensitivity and intermittent sleeplessness. The only particular ailment relating to a specific portion of the body was John Wilson's chest pains. These pains were first exhibited several years after the shooting. Although one of the physicians testifying at trial attributed these pains to "anxiety," there is simply no evidence that adequately links this episode with the post-traumatic stress disorder. In any event, the plaintiffs stated repeatedly that they did not consider the chest pain to be an important factor. They concede that a symptom (chest pain) arising out of another symptom (anxiety) arising out of a traumatic event (the Club 89 occurrences) is not a condition that supports a recovery.

Plaintiffs contend that their relevant symptoms are those of a person suffering from post-traumatic stress disorder, as shown by an authoritative publication, the Diagnostic Statistical Manual (DSM) III. They further contend that observation of these anxiety related symptoms by physicians and others provides the objective symptomatology necessary for a recovery of damages. However, the fact that attending physicians and friends hear about and observe an emotional state of mind does not transform such complaints and observations into objective findings of physical injury. The Court finds that, of all the symptoms recited, only the chest pains are susceptible to objective verification. Accordingly, under the facts of

this case, the traumatic stress disorder and its various manifestations are not compensable.[1]

IT IS HEREBY ORDERED that defendant's motion for judgment notwithstanding the verdict is granted.

IT IS FURTHER ORDERED that the parties' motions to retax costs are hereby rendered moot, and each party shall bear its own costs.

DATED this 6th day of February, 1984.

BY THE COURT:

/s/ C. Arlen Beam
United States District Judge

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[1]To categorize damages resulting from emotional trauma into distinct categories of "physical" and "mental" pain is not to trivilize the latter, but to protect the Court and defendants from exposure to potentially fraudulent claims. *See generally* Prosser, Law of Torts § 54 (4th Ed. 1971).

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JUDGMENT

September Term, 1984

No. 84-1314NE

John L. Wilson, et al,

Appellants,

vs.

Sears, Roebuck & Co., etc.,

Appellee.

Appeal from the United States District Court
for the District of Nebraska

CV. 80-0-117

(Filed August 26, 1985)

This appeal from the United States District Court was submitted on the record of the said District Court, briefs of the parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the said District Court in this cause be, and the same is hereby affirmed in accordance with the opinion of this Court.

March 20, 1985

Costs of appellee for briefs for recovery from appellants: $850.67

A true copy.

ATTEST: /s/ Robert D. St. Vrain

Clerk, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

8/23/85

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-1314

John L. Wilson, et al.,
Appellants,

v.

Sears, Roebuck & Co.,
a New York corporation,
Appellee.

Appeal from the United States District Court
for the District of Nebraska.

Filed: August 14, 1985

Before HEANEY, Circuit Judge, HENLEY, Senior Circuit Judge, and JOHN R. GIBSON, Circuit Judge.

ORDER

The petition for rehearing and the motion to certify the issue or issues presented in this appeal to the Nebraska Supreme court are denied. The motion for leave to file brief amicus curiae filed by the Nebraska Association of Trial Attorneys is denied.

APPENDIX E

James v. Lieb, 221 Neb. 47, — N.W.2d — (October 25, 1985)

(Due to the extensive length and non-relevant portions of the entire case, only the relevant portions pertaining to the issues which appear in the Court below are appended. The below pages are 58-60.)

Before concluding, we must also address the further requirement of a cause of action for emotional distress in *Fournell v. Usher Pest Control Co.*, 208 Neb. 684, 305 N.W.2d 605 (1981), that plaintiff from the emotional concurrent physical injury resulting from the emotional trauma. Other courts adopting the *Dillon* approach, to a certain degree, have retained this feature of the "zone of danger" rule. See, e.g., *Ramirez v. Armstrong, supra; Barnhill v. Davis*, 300 N.W.2d 104(Iowa 1981); *Corso v. Merrill*, 119 N.H. 647, 406 A.2d 300 (1979). We now reject this requirement for many of the reasons stated in the Chief Justice's dissent in *Fournell, supra* at 697, 305 N.W. 2d at 611: "To . . . require that, before one who is mentally injured may recover, he must at least regurgitate once seems . . . to be imposing upon the law a requirement that makes little or no sense."

Ostensibly, the problem in this area is of proving to a jury that a reasonable person in the position of the bystander plaintiff has suffered a compensable injury. While physical manifestation of the psychological injury may be highly persuasive, such proof is not necessary given the current state of medical science and advances in psychology. There are primarily three problems with this requirement: (1) It is overinclusive, since it could possibly lead to recovery for trivial claims of mental distress accompanied by physical symptoms; (2) It is underinclusive, since serious distress is arbitrarily deemed not compen-

sable if not accompanied by physical symptoms; and (3) It encourages extravagant pleadings and distorted testimony. See, *Molien v. Kaiser Foundation Hospitals*, 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980); *Culbert v. Sampson's Supermarkets Inc.*, 444 A.2d 433 (Me. 1982); *Sinn v. Burd*, 486 Pa. 146, 404 A.2d 672 (1979); *Paugh v. Hanks*, 6 Ohio St. 3d 72, 451 N.E.2d 759 (1983).

In reaching our decision we are not unmindful of the several policy arguments advanced against the cause of action we have adopted. Typically, opponents of expanding liability in this area contend that (1) bystander recovery will inundate the courts with fictitious injuries and fraudulent claims; (2) courts will be deluged with a flood of litigation; (3) bystander recovery will unduly burden defendants with undue liability; and (4) once recognized, liability cannot reasonably be restrained. Each of these arguments have been adequately reflected by other courts. See, *Sinn v. Burd, supra; Culbert v. Sampson's Supermarkets Inc., supra.* We add the following comments.

First, even courts opposed to recognizing this cause of action have acknowledged that the fear of fraudulent claims alone is an insufficient reason to deny all such claims. See *Tobin v. Grossman*, 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969). Furthermore, the "zone of danger" rule also carries with it the risk of fraudulent claims. "It is not hard to imagine plaintiffs and their attorneys falsely alleging that the claimant was in some small way injured by the defendant's negligence, or was within the zone of danger in order to present a valid cause of action." Liebson, *Recovery of Damages for Emotional Distress Caused by Physical Injury to Another*, 15 J. Fam. L. 163, 174 (1977). Also, it is not unlikely that under a

"zone of danger" rule plaintiffs would carefully draft pleadings so as to vaguely present a factual question that the plaintiff was also in peril. Liebson, *supra*.

Second, taking California as an example, experience shows that its courts have not been overwhelmed with litigation in this area. See *Ramirez v. Armstrong*, 100 N.M. 538, 673 P.2d 822 (1983).

Third, the "dollars and cents" argument that society cannot afford the costs that will ensue from recognizing liability for the demonstrable injury of emotional distress naturally resulting from defendant's negligent act has been aptly dispelled. See *D'Ambra v. United States*, 114 R.I. 643, 338 A.2d 524 (1975). The possibility of increased insurance costs alone should not deny recovery for an otherwise valid claim.

Finally, we are not delayed by the specter that recognizing a cause of action for bystander recovery will naturally entail liability to every acquaintance of the victim. As we have emphasized, the class of bystanders limited to those with a marital or intimate familial status will sufficiently circumscribe the defendant's liability.

In summary, we hold that a plaintiff bystander has a cause of action for negligently inflicted foreseeable emotional distress upon a showing of marital or intimate familial relationship with a victim who was seriously injured or killed as a result of the proven negligence of a defendant. We thus find error in the district court's order sustaining the defendants' demurrer.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

Supreme Court, U.S.
FILED
DEC 6 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-811

In The
Supreme Court of the United States
October Term, 1985

JOHN L. WILSON and ROBERTA L. WILSON,
Husband and Wife,
Petitioners,

vs.

SEARS, ROEBUCK AND CO.,
a New York corporation,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The opinion of the Eighth Circuit Court of Appeals, No. 84-1314, 757 F.2d 948 (8th Cir. Mar. 20, 1985), appears as Appendix A. The opinion of the United States District Court for Nebraska, No. CV80-0-117, slip opinion (D. Neb. Feb. 6, 1984), appears as Appendix B. The entire written opinion of the Supreme Court of the State of Nebraska in the decision *James v. Lieb*, 221 Neb. 47, 375 N.W.2d 109 (Oct. 25, 1985), appears as Appendix C. Petitioners' motion for leave to file a second petition for rehearing (November 9, 1985) in the Eighth Circuit Court of Appeals appears as Appendix D.

———o———

STATEMENT OF CASE

On September 25, 1977, Ulysses Lee Cribbs, Jr. (hereinafter "Cribbs") entered a retail store operated by Respondent Sears, Roebuck and Co. (hereinafter "Sears"). Cribbs indicated to a sales clerk that he wished to purchase a "slug" gun for the purpose of hunting rabbits. He also indicated a concern over the purchase price of the gun, yet stated that he wanted a gun that would shoot "fast". The sales clerk showed Cribbs a pump shotgun which was on sale. Cribbs agreed to purchase the shotgun and was then asked by the sales clerk to fill out some forms, including Form 4473, pursuant to regulations under 18 U.S.C. § 922. Form 4473 includes questions directed to the firearms purchaser. Question 8(e) asks:

> Have you ever been adjudicated mentally defective or have you ever been committed to a mental institution?

In response to this question, Cribbs first answered "no", then crossed out his response and wrote "After V. War—Short Period". In response to the sales clerk's questioning, Cribbs responded that he experienced a brief period of adjustment after military service in the Vietnam War. The sales clerk called the assistant store manager, and as she and Cribbs waited for him to arrive, the clerk asked Cribbs if he had ever been committed to a mental institution. Cribbs responded that he had not. The assistant store manager arrived and looked at Cribbs' Form 4473, and then asked Cribbs to explain his response. Cribbs replied that he was not sure it was necessary to include on the form, but that he had experienced a brief period of readjustment after the Vietnam War. Cribbs was asked to reread the question and respond truthfully. Cribbs crossed out his earlier response and again wrote "no". The sale of the shotgun was completed after twenty (20) to twenty-five (25) minutes. It has never been proven that Cribbs was ever committed to a mental institution or adjudicated mentally defective prior to September 25, 1977.

Cribbs was characterized by the sales clerk as an articulate, polite, well-dressed and groomed negro male. The sales clerk testified that there was nothing unusual about his manner or appearance. The sales clerk testified that Cribbs appeared impatient, explaining that he had to pick up his wife at church. An investigating police officer testified that the sales clerk had indicated that Cribbs was "nervous".

At the time of the purchase, Cribbs was a voluntary patient at the Omaha Veteran's Administration Hospital.

Cribbs' treating psychotherapist testified that Cribbs suffered from paranoid schizophrenia, a thinking disorder. Cribbs' psychotherapist, who was in close contact with Cribbs before and after the shotgun purchase, testified that at the time of the purchase, Cribbs was not actively or "floridly" psychotic. The psychotherapist characterized Cribbs' condition at that time as one in "remission" and undetectable by lay persons. Cribbs' psychotherapist did not consider Cribbs as having any propensity for violence or violent behavior, and testified that there is no greater incidence of violence among the mentally ill than among the general population. Cribbs' psychotherapist knew of Cribbs' ownership of the shotgun, yet was only concerned by the displeasure this fact caused Cribbs' girlfriend. The psychotherapist indicated that many of his mental patients own firearms.

On November 26, 1977, Cribbs used the shotgun sold by Respondent Sears, randomly firing upon a crowd of patrons at the Club 89 restaurant in Omaha, Nebraska. Petitioners were among the patrons that night, but were spared physical injury from the shotgun blast. Dennis Lipari, described as a close and intimate friend of Petitioner John Wilson, was among other friends of Petitioners present at Club 89 that evening. Dennis Lipari died from wounds inflicted from the random shots fired by Cribbs. During the shooting, Petitioner John Wilson, at that time a Deputy with the Douglas County Sheriff's office, attempted to return fire upon Cribbs with his own weapon, which jammed and refused to fire. Subsequent to the shooting, Petitioner John Wilson attempted to render aid to Dennis Lipari, cradling Mr. Lipari in his arms until a doctor was summoned.

On February 7, 1980, Petitioners John and Roberta Wilson filed an action at law for damages in the United States District Court for the District of Nebraska, alleging that Respondent Sears had violated the Gun Control Act of 1968 by selling a firearm to Cribbs. Subsequently, Petitioners amended their complaint to allege that Sears was negligent in selling a firearm to Cribbs. Nearly two (2) years after the incident, Petitioners were given a psychiatric evaluation for purposes of this litigation. Petitioner Roberta Wilson sought psychiatric treatment for only a brief period after the psychiatric evaluation. Petitioner John Wilson did not seek any further medical or psychiatric treatment until nearly four (4) years after the Club 89 incident, when he entered a hospital with the complaint of chest pain. The chest pain was diagnosed as a hiatal hernia, cause (etiology) unknown. Petitoner John Wilson was also diagnosed as suffering from essential hypertension, emphysema and anxiety/depression. Testimony indicated that the cause (etiology) of essential hypertension is unknown. John Wilson's own internist attributed the cause of Wilson's emphysema to his habit of cigarette smoking. and testified that there are no "physical findings" for anxiety or depression, and that the diagnosis is based upon observation and the personal complaints of the patient. After his hospitalization, John Wilson sought psychiatric treatment from Dr. Ivan Sletten, a psychiatrist. Dr. Sletten indicated that anxiety and depression are facets of John Wilson's pre-morbid personality, a personality characteristic existing prior to the Club 89 incident.

Both Petitioners are alleged to suffer from post-traumatic stress disorder. The psychiatric team retained to evaluate the Petitioners' claims testified that, as a result

of the Club 89 incident, Petitioner Roberta Wilson suffered acute post-traumatic stress disorder, a mental disorder which manifests and has symptoms of a duration less than six (6) months. This psychiatric team further testified that Petitioner John Wilson suffered chronic post-traumatic stress disorder, a mental disorder which may manifest and have a duration longer than six (6) months. Dr. Ivan Sletten, John Wilson's treating psychiatrist, testified that the loss of Dennis Lipari, John Wilson's close friend, was a significant contributing factor to any emotional disturbance suffered by John Wilson. Testimony from other witnesses who discussed the Club 89 incident with John Wilson indicated that the loss of Dennis Lipari emotionally upset John Wilson.

Prior to trial, Respondent Sears moved for summary judgment and renewed said motion at the close of Petitioners' evidence. At the close of all evidence, Sears moved for directed verdict. Prior to the submission of the case to the jury, Sears submitted requested instructions upon the issues of bystander recovery, mitigation of damages, and intervening and superseding cause. Specifically, Sears requested that the Court instruct the jury concerning the noncompensability of injuries which result from witnessing injury to a third party with whom the plaintiff is not a close familial relative. None of these requested instructions were given by the Court. Sears further objected to the Court's charge to the jury in instructions upon issues which were not sustained by the evidence. Particularly, Sears objected to the Court's instruction that a violation of federal statute or regulation constituted evidence of negligence, absent competent evidence that Sears violated

any federal statute or regulation in regard to the sale of the shotgun used by Cribbs.

On December 14, 1983, the jury returned a verdict in favor of Petitioners. On December 23, 1983, pursuant to F.R.C.P. 50(b), Respondent Sears filed a motion for judgment notwithstanding the verdict or, in the alternative, motion for new trial. On February 6, 1984, the trial court granted Sears' motion for judgment n.o.v., holding that "even if Sears was negligent, plaintiffs have not suffered damages that are compensable under Nebraska law" (Appendix B). In so holding, the trial court relied upon the Nebraska Supreme Court's decision in *Fournell v. Usher Pest Control*, 208 Neb. 684, 305 N.W.2d 605 (1981). The trial court did not rule on Sears' motion for new trial and did not address any of the errors assigned by Sears in the Court's instructions to the jury.

Petitioners perfected an appeal to the Eighth Circuit Court of Appeals. In brief and in argument before the Eighth Circuit Court of Appeals, Respondent Sears urged affirmance not only on the grounds stated by the trial court, but also upon the ground that Petiitoners failed to establish with sufficient evidence any breach of duty recognized by law. Sears also preserved errors assigned in brief and argument concerning the trial court's instructions to the jury. On March 20, 1985, the Eighth Circuit affirmed the trial court's decision below (Appendix A). Petitioners filed an alternative motion, requesting either rehearing or certification of a question to the Nebraska Supreme Court. Petitioners never presented a question for certification in the manner in which such requests are framed. Petitioners' motion for rehearing was denied on August 14, 1985.

On October 25, 1985, the Nebraska Supreme Court rendered a decision in the case of *James v. Lieb,* 221 Neb. 47, 375 N.W.2d 109 (1985) (Appendix C). Petitioners assert that the decision below (Appendix A) is in conflict with the Nebraska Supreme Court decision in *James v. Lieb* (Appendix C), and have filed a petition for writ of certiorari in this Court. In addition, on November 9, 1985, Petitioners filed a motion for leave to file a second petition for rehearing in the Eighth Circuit Court of Appeals (Appendix D). Petitioners' motion in the Eighth Circuit is pending.

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SUMMARY OF ARGUMENT

The case at hand is not suited for review in this Court. The case involves many issues of law which must be resolved before a final determination on the merits is made. Some of these issues regard the tort and damage law of Nebraska, including the law of Nebraska in regard to bystander recovery, vicarious liability, and intervening cause. These issues are important to this case but are of no significant consequence to federal law. Another issue regards interpretation of the Gun Control Act of 1968, an issue which has not been decided by the Eighth Circuit. Pending before the Eighth Circuit is Petitioners' motion for leave to file a second petition for rehearing (Appendix D). The Eighth Circuit has heard argument on all of the issues in this case; therefore, it would appear that the Eighth Circuit is best equipped to determine whether a subsequent change in Nebraska law requires a rehearing on the issues or reversal of the judgment against Petitioners in light of the Rules of Decision Act.

ARGUMENT

A REVIEW ON A WRIT OF CERTIORARI IS NOT A MATTER OF RIGHT BUT OF SOUND JUDICIAL DISCRETION, AND SHOULD NOT BE GRANTED WHERE A REMEDIAL MOTION PENDS BEFORE A CIRCUIT COURT OF APPEALS OR WHERE ADEQUATE GROUNDS EXIST FOR AFFIRMANCE OF A FEDERAL DISTRICT COURT'S DECISION ON GROUNDS CONSIDERED AND DECIDED BY THE CIRCUIT COURT OF APPEALS.

In their petition to this Court for review by writ of certiorari, Petitioners oversimplify the facts and issues present in this case. Petitioners would have the Court believe that the only issue present in this case is whether Nebraska law entitles Petitioners to recover for negligent infliction of emotional distress, absent evidence of accompanying or resulting physical injury. Nevertheless, there are other issues which have been left unresolved in this case, particularly whether the decision of the trial court should be affirmed upon other grounds[1] or whether Re-

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1. Petitioners allege that Respondent Sears was negligent in selling and entrusting a shotgun to a mentally unstable and dangerous individual. *See* Petition for Writ of Certiorari at p. 2. The applicable law is that vicarious liability based upon the acts of a mentally incapacitated actor requires that the defendant have knowledge of the mentally incapacitated actor's dangerous propensities which cannot be inferred from simple knowledge of the actor's mental incapacity. *Sabatinelli v. Butler,* 363 Mass. 565, 296 N.E.2d 140 (1973); *Treptow v. Rufledt,* 254 Wis. 534, 36 N.W.2d 681 (1949); *see also Shelton v. Board of Regents,* 211 Neb. 820, 320 N.W.2d 748 (1982). Viewed in a light most favorable to Petitioners, Petitioners' evidence can only establish

(Continued on following page)

spondent Sears is entitled to a new trial by reason of error in the trial court's instructions to the jury.[2] These issues

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(Continued from previous page)

that Respondent Sears had reason to know of Cribbs' mental incapacity. Petitioners adduced no competent evidence that Sears knew or had reason to know of Cribbs' propensity for violence or the misuse of firearms. *See Thompson v. Lillehei*, 164 F. Supp. 716 (D. Minn. 1958), *aff'd* 273 F.2d 376 (8th Cir.)

2. The trial court has the duty not to submit to the jury issues which are not sustained by the evidence. *Schanaman v. Ramirez*, 206 Neb. 212, 292 N.W.2d 39 (1980); *Sacco v. Gau*, 188 Neb. 808, 199 N.W.2d 605 (1972). In the case at hand, the trial court erred in instructing the jury that a violation of a federal statute or regulation constituted evidence of negligence, absent competent evidence that Respondent Sears violated any statute or regulation. In addition, the Court erred in instructing the jury upon elements of damages in regard to lost wages, loss of consortium, and past and future expenditures for medications upon Petitioners' failure to adduce competent evidence concerning the value of wages or marital services alleged as lost, or the extent of expenditures with reasonable certainty as to medication necessitated for treatment of alleged injuries.

In addition, the failure of the trial court to instruct the jury upon issues presented in the pleadings and the evidence adduced at trial is prejudicial err[illegible] *Egenberger v. National Alfalfa Dehydrating & Milling Co.*, 164 Neb. 704, 83 N.W.2d 523 (1957); *Krepcik v. Interstate Transit Lines*, 154 Neb. 671, 48 N.W.2d 839 (1951). Despite testimony that the loss of Dennis Lipari was a significant contributing factor to the emotional disturbance of Petitioner John Wilson, the trial court refused Respondent Sears' request to instruct the jury on the issue of bystander recovery. Other testimony adduced at trial indicated that both Petitioners would have benefited from regular psychiatric treatment. In Nebraska, plaintiffs injured by negligent acts are required to mitigate damages by seeking prompt medical treatment in their exercise of reasonable care. *Colton v. Benes*, 176 Neb. 483, 126 N.W.2d 652 (1964). Nevertheless, the trial court refused Sears' proposed instruction on the mitigation of

(Continued on following page)

were not addressed in the decisions of either the trial court or the Eighth Circuit Court of Appeals.

Presently pending before the Eighth Circuit Court of Appeals is Petitioners' motion for leave to file a second petition for rehearing. Clearly there is no reason for this Court to review this case while such motion pends in the tribunal which has all the facts and arguments before it.

In seeking review by this Court, Petitioners cite *Huddleston v. Dwyer,* 322 U.S. 232 (1944). Yet the application of the guiding principles in *Huddleston* indicate that this Court should defer to the circuit appellate court before entertaining questions on the application of newly-developed state precedent. In *Huddleston,* the Supreme Court of Oklahoma reexamined and partially overruled precedent on which the circuit court had relied in affirming a federal district court's decision. The Supreme Court of the United States stated:

> The second opinion of the Oklahoma Supreme Court in the *Wilson* case has at least raised such doubt as to the applicable Oklahoma law as to require its reexamination in the light of that opinion and of later decisions of the Supreme Court of Oklahoma on which Respondents rely, before pronouncement of a final judgment in the case by the federal courts. That doubt is not to be resolved in the first instance by this Court. We have often had occasion to point out the importance to the orderly judicial administration of state

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damages. Further, evidence adduced below raised the issue of intervening and proximate cause in light of the criminal acts of Ulysses Cribbs and the negligent acts of Cribbs' treating psychotherapist. Sears submits that the offered instructions on intervening and superseding cause should have been submitted to the jury.

> laws in the federal courts that questions of state law required to be decided here should first be considered and decided by the state or federal court from which the case is brought to this Court for review. The decision of the highest court of a state on matters of state law are in general conclusive upon us, and ordinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts. When we are called upon to decide them, the expression of the views of the judges of those courts who are familiar with the intricacies and trends of local law and practice, if not indispensable, are at least a highly desirable and important aid to our determination of state law questions. This Court will not ordinarily decide them without that aid where they may conveniently first be decided by the court whose judgment we are called upon to review. (Citations omitted).

322 U.S. at 236.

Petitioners have submitted the decision of *James v. Lieb*, 221 Neb. 47, 375 N.W.2d 109 (1985) (Appendix C) as a change in the law of Nebraska applicable to this case. Applying the principle of *Huddleston*, the Eighth Circuit's interpretation and application of *James v. Lieb*, (Appendix C) to this case is particularly critical, since that decision not only abrogates the requirement of "physical injury" in negligence cases, but further states the applicable law of Nebraska regarding bystander recovery. The issue of bystander recovery was raised in earlier argument before the Eighth Circuit in this case, but was not addressed by the Eighth Circuit in its decision (Appendix A).

Petitioners submitted to this Court only a portion of the written opinion in *James v. Lieb* (Appendix C). Petitioners' desire that the federal courts ignore the balance

of the *James* opinion is understandable. Yet, since *James v. Lieb* (Appendix C) is now the applicable law of Nebraska, its application to this case should not be limited simply to the abrogation of the requirement of "physical injury" in an action for negligent infliction of emotional distress. *James v. Lieb* involved a brother who, while outside the "zone of danger", witnessed serious injury inflicted upon his sister as the alleged result of plaintiff's negligence. The case presented a question of first impression regarding bystander recovery in the State of Nebraska. In overruling the trial court's demurrer, the Nebraska Supreme Court established rules under which bystanders may recover for emotional distress which results from witnessing a serious injury to another. The Nebraska Supreme Court held:

> [A] plaintiff bystander has a cause of action for negligent infliction of emotional distress upon *a showing of marital or intimate familial relationship with a victim* who is seriously injured or killed as a result of the proven negligence of a defendant. (Emphasis added).

375 N.W.2d at 117. *James v. Lieb* establishes that in Nebraska, a plaintiff bystander cannot recover for emotional distress which results from witnessing injury to a third party who has no familial relationship with the plaintiff. In the case at hand, testimony from witnesses who discussed the Club 89 incident with Petitioner John Wilson and the testimony of John Wilson's own treating psychiatrist indicates that the loss of Dennis Lipari was a significant contributing factor to Petitioner John Wilson's emotional disturbance. The significance of such evidence is demonstrated by the following statement from an article which addressed the distinctions between law and medicine in the assessment of causality:

> Causation may present unique problems in mental distress cases because of the fact that medicine and law have differing definitions of "cause". Under tort law, causation has two components—actual cause or cause-in-fact and proximate cause. The legal standard for ascertaining the cause-in-fact of a particular event is a but-for standard. The doctor, however, does not look to whether a particular traumatic stimulus was the *sine qua non* of an injury, but only to whether it was a significant contributing cause to the injury. Thus, in applying the legal standard to the medical evidence, the trier of fact must determine not what could have caused, but what did in fact cause, plaintiff's injury. Again . . . medical knowledge must be translated into a legal conclusion.

Sagell, "Causality Assessment—Medical v. Legal", *Trial*, June-July 1969 at 59. In making a proper legal determination as to the proximate cause of Petitioner John Wilson's injuries, the trier of fact would have to have differentiated between emotional injury resulting from fright and emotional injury resulting from other noncompensable traumatic stimulus, such as witnessing the death of Dennis Lipari. Yet the jury, the trier of fact in this case, was not instructed, as requested by Respondent Sears, upon the law concerning bystander recovery. Petitioners cannot deny that *James v. Lieb* demonstrates the error in the failure to instruct the jury on this issue. *See Egenberger v. National Alfalfa Dehydrating & Milling Co.*, 164 Neb. 704, 83 N.W.2d 523 (1957) (failure of the trial court to instruct the jury upon issues presented in the pleadings and the evidence adduced at trial is prejudicial error). If *James v. Lieb* is the applicable law in this case, the Eighth Circuit should be permitted to decide this case in light of the *whole* opinion. Nothing in the Rules of Decision Act, 28 U.S.C. § 1652, requires the federal courts to apply

James v. Lieb in regard to the abrogation of the "physical injury" rule, while disregarding the direct holding of that decision which establishes the noncompensability of emotional injury which results from a plaintiff witnessing the death of a close friend.

It would appear to be within the policy and purpose of this Court to deny or defer certiorari under circumstances where a Circuit Court of Appeals has neither addressed the application of newly-stated precedent nor disposed of issues preserved in the record of the case concerning the determination of other applicable and controlling law, error in instructions, or the lack of sufficient evidence. Cf. *Federal Trade Commission v. Anheuser-Busch, Inc.*, 363 U.S. 536 (1960). The present circumstances fall within such guidelines and demonstrate that a grant of a writ for certiorari would be improvident.[3]

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3. Petitioners cite numerous precedents for the proposition that a change in state law will be applied even when a matter is pending on certiorari. *See Dinsmore v. Southern Express Co.*, 183 U.S. 115 (1901); *United States v. Alabama*, 362 U.S. 602 (1960); *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981); *Mills v. Rogers*, 457 U.S. 291 (1982). Yet, Petitioners cite no case where certiorari has been granted for the sole reason that a change in state law has occurred. Even *Huddleston* is inapposite, for in *Huddleston*, the Supreme Court was reviewing the decision of the appellate court denying petitioner's motion for leave to to file a petition for rehearing. In *Huddleston*, the court found that the denial of the motion for leave was a significant departure from federal law, as stated in the Rules of Decision Act. *Huddleston*, 322 U.S. at 236; *see also* Revised Rules of Supreme Court of the United States, Rule 17. In the present case, Petitioners have not presented a situation where a circuit court has significantly departed from the Rules of Decision Act. First, for the reason that the question presented for review in this Court has not been presented to the Eighth Circuit Court of Appeals. Second, for the

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In addition, it has been argued that other grounds appear in the record of this case upon which the trial court's decision could be affirmed. The Eighth Circuit, which has reviewed the record and has been briefed on these issues, can readily determine if it is necessary in light of the decision in *James v. Lieb* to entertain further hearing in this proceeding.

PETITIONERS' MOTION FOR CERTIFICATION WAS PROPERLY DENIED BY THE EIGHTH CIRCUIT COURT OF APPEALS.

Petitioners' argument that the Eighth Circuit Court of Appeals should have submitted to the Nebraska Supreme Court a certified question concerning the "physical injury" requirement as stated in *Fournell v. Usher Pest Control Co.*, 208 Neb. 684, 305 N.W.2d 605 (1981) is frivolous. Notwithstanding the fact that no question was framed for submission to the Nebraska Supreme Court by Petitioners' motion for certification, it is further apparent that such motion was improper and untimely. A motion for certification should be brought in the District Court for consideration by the trial judge at the earliest possible stage of the proceeding. *See Harris v. Karri-On Kampers, Inc.*, 640 F.2d 65 (7th Cir. 1981). Petitioners' motion for certification was brought *after* the Eighth Cir-

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reason that other grounds exist in applicable state law for affirmance of the trial court's decision. In light of the latter circumstances, it would not necessarily be a significant departure from federal law if the Eighth Circuit denied Petitioners' motion for leave to file a second petition for rehearing, since such a denial would not be a significant departure from the Rules of Decision Act if based on other grounds appearing in the record.

cuit rendered its judgment. Further, a motion for certification should not be brought in order to change the state court's pronouncement upon the law. *Venezia v. Miller Brewing Co.*, 626 F.2d 188 (1st Cir. 1980); *Tarr v. Manchester Ins. Corp.*, 544 F.2d 14 (1st Cir. 1976). Petitioners' statement that the law in Nebraska regarding the requirement of "physical injury" was ambiguous is outrageous. *James v. Lieb* (Appendix C) did not clarify the law of Nebraska as stated by *Fournell*. *James v. Lieb* overruled *Fournell*. Petitioners argue that they should have been permitted to accomplish this change in Nebraska law, disregarding their own choice of federal jurisdiction and their own delay in raising the question of certification until after the Eighth Circuit affirmed the judgment of the trial court. *See* American Law Institute Study of Division of Jurisdiction Between State and Federal Courts, *Official Draft 1969* at 296; *see also Cantwell v. University of Massachusetts*, 551 F.2d 879 (1st Cir. 1977).

CONCLUSION

Petitioners allege a cause of action in tort under the law of Nebraska for the alleged negligent infliction of emotional distress. Diversity of citizenship is the basis of federal jurisdiction. After a complete trial on the merits, the District Court granted judgment n.o.v. for Respondent Sears, holding that as a matter of law, Petitioners could not recover for the negligent infliction of emotional distress without proof of accompanying or resulting physical injury. While this ground was urged by Sears below, other additional grounds for judgment n.o.v. were also as-

serted by Sears. The District Court did not address these additional grounds in its decision (Appendix B) and further, the District Court failed to rule on Sears' motion for new trial or state an opinion on the errors assigned by Sears' motion. The matter was appealed to the Eighth Circuit Court of Appeals which affirmed, holding that as a matter of law Petitioners could not recover for the negligent infliction of emotional distress without proof of accompanying or resulting physical injury. On appeal, the parties briefed and argued all issues preserved in the record, including issues of law regarding bystander recovery, vicarious liability, intervening cause, and interpretation of the Gun Control Act of 1968. In light of the apparent rule of Nebraska law regarding the requirement of "physical injury", the Eighth Circuit was not required to consider these questions. Subsequently, the Nebraska Supreme Court changed the rule of Nebraska law concerning negligent infliction of emotional distress by abrogating the requirement that plaintiffs demonstrate an accompanying or resulting physical injury. In the same decision, the Nebraska Supreme Court stated the rule of Nebraska law applicable to bystander recovery. If this subsequent decision has force and effect in this case, its application should be determined by the Eighth Circuit which has considered the full record of this case and can make a reasoned determination of the full application of the subsequent decision. At this time, a motion for leave to file a second petition for rehearing pends before the Eighth Circuit. Upon consideration of the complexity of the factual and legal issues herein, and that determination of these questions presents no significant question of federal law which has been passed on or considered by the Eighth Circuit, Respondent Sears submits that it would be im-

provident for this Court to exercise its discretion by granting a writ of certiorari.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-1314

Appeal from the United States District Court
for the District of Nebraska

John L. Wilson and Roberta L. Wilson,
Husband and Wife,

Appellants,

v.

Sears, Roebuck and Co., a New York Corporation,

Appellee.

Submitted: October 10, 1984
Filed: March 20, 1985

Before HEANEY, Circuit Judge, HENLEY, Senior Circuit Judge, and JOHN R. GIBSON, Circuit Judge.

JOHN R. GIBSON, Circuit Judge.

The firing of a shotgun into the crowd at a supper club where John and Roberta Wilson were dining gives rise to this diversity action. Although they were not struck by the blasts, the Wilsons saw one member of their party killed and another suffer serious injury. Alleging that this incident caused them to suffer post-traumatic stress disorder, they sued Sears, Roebuck and Co., claiming that it was negligent in selling the gun to the mental patient who fired it in the club. The district court[1] set aside the verdicts awarding the Wilsons $85,000 and entered judg-

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[1]The Honorable C. Arlen Beam, United States District Judge for the District of Nebraska.

ment notwithstanding the verdict because the Wilsons had not sustained physical injuries susceptible of objective determination. The Wilsons appeal, arguing that the court improperly interpreted Nebraska law. We affirm the judgment of the district court.

On November 26, 1977, John and Roberta Wilson accompanied some friends to the Club 89 restaurant in Omaha. As they waited for a show to begin, Ulysses Cribbs, who had been treated in the Veterans Administration Hospital and diagnosed as a paranoid schizophrenic, began randomly firing at the patrons with a shotgun. John Wilson felt a very hot sensation go by the right side of his face. Roberta Wilson felt something fly into the side of her face and her hand, causing a stinging sensation. John, a police officer, yelled at his wife to give him his gun that she was carrying in her purse. He attempted to fire at Cribbs, but his gun malfunctioned. A companion of the Wilsons', Dennis Lipari, was shot in the face and died later, and Mrs. Lipari was seriously wounded. John began crying and became hysterical. John and Roberta were taken to the hospital, where they were given injections to calm them and released.

Around a week after the incident, John Wilson went to St. Louis for police training. His training officers stated that after his return he became quiet, withdrawn, preoccupied, and "was a different person." Upon returning to Omaha, Wilson was very quiet, withdrawn, and no longer displayed affection. Friends described him as "nervous," "going into a shell," and becoming "completely changed."

Wilson found himself more afraid of guns, violence and dying. While on patrol he would become frightened,

breaking into a cold sweat with palpitations. He felt that he could no longer perform his duties and resigned his position as a deputy sheriff. He claims to have suffered from nightmares, frequent headaches, dizziness, depression, nervousness, weight loss, and poor appetite.

In September 1979, the Wilsons were evaluated for purposes of this litigation. John was examined by a psychiatrist and a clinical psychologist and was found to suffer from a disorder described as "post-traumatic stress disorder, chronic type." *See generally* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 236-39 (3d ed. 1980). This manual describes the disorder as "the development of characteristic symptoms following a psychologically traumatic event that is generally outside the range of usual human experience." *Id.* at 236. A psychiatrist testified that the condition was directly attributable to the shooting incident. Four years after the shooting, John was treated by an internist and another psychiatrist for severe anxiety, severe depression, chest pains, hypertension, and a hernia. A psychiatrist testified that as a result of the traumatic experience, John Wilson became impaired in his job performance, social performance, and overall ability to function. He is required to take medication to assist him in sleeping and to control dizzy spells, blood pressure, and nervousness. Roberta was diagnosed to have suffered from a mild case of acute post-traumatic stress disorder. She claimed to have lost the affection of her husband as a result of the incident.

The Wilsons filed suit against Sears alleging that it had negligently sold the shotgun to Cribbs. After verdicts for the plaintiffs ($75,000 for John, $10,000 for Ro-

berta), the court granted a motion for a judgment notwithstanding the verdict:

> Damages for negligent infliction of emotional distress are only recoverable when such distress results in physical injury manifested by objective symptomatology. *Fournell v. Usher Pest Control,* 208 Neb. 684, 305 N.W.2d 605 (1981); *Owens v. Childrens Memorial Hospital,* 347 F. Supp. 663 (D. Neb. 1972); *see also Restatement (Second) of Torts* § 436A [1965]. While the Court will concede that the plaintiffs suffered severe emotional disturbance while present at or as an immediate result of the Club 89 shooting, we find that their injuries are not of the type susceptible of objective determination.
>
> Plaintiffs were diagnosed as suffering from post-traumatic stress disorder. Plaintiffs assert that they suffer from a panoply of anxiety-related ailments, including generalized pain, an inability to concentrate, hyperalertness, diminished sensitivity and intermittent sleeplessness. The only particular ailment relating to a specific portion of the body was John Wilson's chest pains. These pains were first exhibited several years after the shooting. Although one of the physicians testifying at trial attributed these pains to "anxiety," there is simply no evidence that adequately links this episode with the post-traumatic stress disorder. In any event, the plaintiffs stated repeatedly that they did not consider the chest pain to be an important factor. They concede that a symptom (chest pain) arising out of another symptom (anxiety) arising out of a traumatic event (the Club 89 occurrences) is not a condition that supports a recovery.
>
> Plaintiffs contend that their relevant symptoms are those of a person suffering from post-traumatic stress disorder, as shown by an authoritative publication, the Diagnostic Statistical Manual (DSM) III. They further contend that observation of these an-

> xiety related symptoms by physicians and others provides the objective symptomatology necessary for a recovery of damages. However, the fact that attending physicians and friends hear about and observe an emotional state of mind does not transform such complaints and observations into objective findings of physical injury. The Court finds that, of all the symptoms recited, only the chest paints are susceptible to objective verification. Accordingly, under the facts of this case, the traumatic stress disorder and its various manifestations are not compensable.

Wilson v. Sears, Roebuck & Co., No. CV-80-0-117, slip op. at 2-4 (D. Neb. Feb. 6, 1984). On appeal, the Wilsons urge that Nebraska law and the evidence presented at trial support a reinstatement of the verdicts.

The district court order concluded that the Wilsons' injuries were not compensable as a matter of Nebraska law because there was no physical injury manifested by objective symptoms. This decision concerning local law in a diversity action is given great weight on appeal. *O'Brien v. Hagen*, 705 F.2d 1001, 1005 (8th Cir. 1983); *Bergstrom v. Sambo's Restaurant, Inc.*, 687 F.2d 1250, 1255 (8th Cir. 1982). In reviewing the order, we look first to *Fournell v. Usher Pest Control*, 208 Neb. 684, 305 N.W. 2d 605 (1981), as it is the latest decision from the Nebraska Supreme Court concerning damages for mental distress.

In *Fournell*, the defendant treated Mrs. Fournell's home for termites. Several months later, she discovered extensive termite damage to the house. One to two months subsequent, she visited a doctor because she cried constantly, was deeply depressed, and could not sleep. She was hospitalized for "reactive depression," and there was

evidence "that her mental and emotional disturbance was caused by the discovery of the termite infestation." 208 Neb. at 686, 305 N.W.2d at 606. The trial court found two elements necessary to recovery: proof that the plaintiff suffered physical injury from emotional trauma, and evidence that the defendant's negligence had placed her in fear of peril for her own safety. The court granted summary judgment for the defendant.

On appeal, the supreme court established two requirements for recovering damages caused by negligently inflicted emotional distress. The plaintiff must have been in the zone of danger created by the defendant's conduct and have suffered "some type of physical injury." 208 Neb. at 687, 305 N.W.2d at 607. The court quoted *Restatement (Second) of Torts* § 436 (1965), which precludes recovery for "emotional disturbance alone, without bodily harm or other compensable damage." It concluded: "[W]hen the termite damage was discovered by the plaintiffs no physical injury resulted to anyone, nor was Susan Fournell placed in fear of bodily harm to herself or anyone else. The plaintiffs' claim for damages here rests on mental and emotional disturbance and distress alone." *Id.* at 687-88, 305 N.W.2d at 607. Alternatively, the court held that as a matter of law the defendant's failure to discover the damage did not place the plaintiffs in a zone of danger. *Id.* at 688, 305 N.W.2d at 607.

The Wilsons urge that the *Fournell* court did not reach the "physical injury" issue and distinguish the case on the ground that Mrs. Fournell was never in physical peril, in contrast to the Wilsons' position in the range of shotgun blasts. The judges dissenting in *Fournell*, however, read the majority opinion to conclude as a matter

of law that "crying, shaking, withdrawing, experiencing depression, and attempting to commit suicide are not sufficiently physical in nature to constitute subsequent physical injury entitling one to recover if believed by a jury." 208 Neb. at 701, 305 N.W.2d at 613 (Krivosha, C.J., dissenting). Whether or not the majority's statements regarding the injury issue were an alternate holding or merely dicta, they provided a basis for the district court to conclude that the state's highest court requires physical injury and that emotional disturbance and distress alone are not sufficient to establish a right to recover. Our function in this diversity case is to determine whether the district court erred in its determination of a state law question. While we entertain the view that the dissenting opinion of *Fournell* is far more persuasive than the majority opinion, it is our duty, as well as the district court's, to follow the court's decision, which is that of a majority of its judges.

Viewing the evidence in a light most favorable to the Wilsons, *see Lackawanna Leather Co. v. Martin & Stewart, Ltd.*, 730 F.2d 1197, 1200 (8th Cir. 1984), the primary "physical injury" demonstrated is John Wilson's chest pains. Wilson's doctor testified that the pains were caused by a hernia and stated the cause of the hernia was unknown. Similarly, the doctor did not link John's hypertension to the shooting incident, for its cause was also unknown. Thus, the district court did not err in ruling

that the Wilsons had failed to prove that they sustained physical injury as defined in *Fournell*.[2]

B.

The Wilsons argue that they should recover because their proof established that the post-traumatic stress disorder is "susceptible of objective determination." Dr. Swanson and Dr. Sletten, psychiatrists, and Dr. Wood, a clinical psychologist, all described the pattern of symptoms of the Wilsons. Dr. Swanson testified that this post-traumatic stress disorder was susceptible of objective determination and his views were mirrored by the others. The district court rejected the Wilsons' argument that their mental and emotional disorders provided the objective symptomatology necessary for recovery. It concluded that such evidence of an emotional state did not transform the complaints and observations "into objective findings of physical injury." The Wilsons argue, however, that this evidence made a submissible case under *Owens v. Childrens Memorial Hospital*, 347 F. Supp. 663 (D. Neb. 1972), *aff'd*, 480 F.2d 465 (8th Cir. 1973).

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[2]In *Netusil v. Novak*, 122 Neb. 749, 235 N.W. 335 (1931), the court noted that there is "liability for damages for physical injuries which are proximately caused by fright and terror produced by one who owes a legal duty to the one injured." *Id.* at ——, 235 N.W. at 337. The defendant's dog snarled at the plaintiff, but did not bite her. She fainted, and as a "result of the shock received from this attack" suffered from "nervous prostration." After a verdict for the plaintiff, the trial court entered judgment for the defendants because the dog had not bitten the plaintiff. The Supreme Court reversed. The *Novak* court did not squarely address whether "nervous prostration" was a physical injury, but simply assumed that it was. Thus, the case does not support the Wilsons' claims of physical injury.

Owens was a diversity action brought by a couple alleging that negligent medical treatment by the defendants resulted in the death of their child, causing them permanent "physical and mental anguish, great emotional disturbance, shock, and injury to their nervous systems." 347 F. Supp. at 664. The court held that the plaintiffs could not recover under Nebraska law because they had not been in peril. *Id.* at 669. The physical injury issue was never decided. The court observed: "whether the plaintiffs have sustained a definite nervous disorder or pure isolated mental anguish has not yet been proved to this Court." *Id.* at 667. It resolved the impact issue after "assuming that plaintiffs [could] prove that a sufficient physical injury has resulted." *Id.*

In dicta, the *Owens* court observed that "even though Nebraska has abrogated the impact rule, there is still a requirement that some type of 'physical injury' result from the negligently inflicted emotional suffering." *Id.* at 666. Endeavoring to define "physical injury," the court surveyed the law in other jurisdictions:

> The term "physical" is not used in its ordinary sense for purposes of applying the "physical consequences" rule. Rather, the word is used to indicate that the condition or illness for which recovery is sought must be one *susceptible of objective determination.* Hence, a definite nervous disorder is a "physical injury" sufficient to support an action for damages for negligence.

Id. at 667 (emphasis added) (quoting *Petition of United States,* 418 F.2d 264, 269 (1st Cir. 1969) (citations omit-

ter)).[3] No Nebraska law was cited in *Owens* to support Petition's discussion of physical injury.

Fournell later cited *Owens* only as recognizing Nebraska law that "there was still a requirement that some type of physical injury result from the negligently inflicted suffering." 208 Neb. at 687, 305 N.W.2d at 607. *Fournell* did not refer to the language from *Owens* discussing the physical injury definition in *Petition*. Moreover, the dissent in *Fournell* also fails to mention *Owens* and its discussion of physical injury. The Wilsons' argument, both to the district court and before us, does not attempt to establish that the evidence proved physical injury, but simply that the evidence of mental and emotional distress was sufficiently objective to recover under *Owens*. As we read *Owens* and *Fournell*, we cannot conclude that the district court erred in requiring proof of physical injury and finding that the evidence had not established such injury.

The district court's instruction,[4] based upon *Owens* reference to *Petition*, may well be contrary to the decision granting judgment notwithstanding the verdict. Nevertheless, we are satisfied that the *Petition* language from

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[3]*Petition* was an admiralty claim arising from a seaman's psychoneurosis due to immersion in frigid waters after his ship had capsized. The grounding of the vessel was held to be an impact sufficient to satisfy the test applied by jurisdictions following the impact rule. 418 F.2d at 268.

[4][T]o be entitled to damages resulting from an emotional disturbance, the plaintiffs must prove by a preponderence of the evidence that they suffered from some type of physical injury resulting from such emotional disturbance and that said physical injury was a proximate result of defendant's negligence. A physical injury is a condition of illness which is susceptible of objective determination.

Owens does not have support in Nebraska law. If there was no submissible issue for jury consideration, a prior inconsistent jury instruction does not prevent the court from correctly ruling the submissibility issue after the verdict. *See Coca Cola Bottling Co. v. Hubbard,* 203 F.2d 859, 862 (8th Cir. 1953) ("[I]n determining whether a trial court has erred in denying a motion for a directed verdict made at the close of the evidence, it is the applicable law which is controlling, and not what the trial court announced the law to be in his instructions."), *quoted in Hanson v. Ford Motor Co.,* 278 F.2d 586, 593 (8th Cir. 1960) (Blackmun, J.). The district court did not err in concluding that *Fournell* disallows recovery for mental and emotional disturbances and stress alone and that this was the extent of injuries that the Wilsons had proved. The judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JOHN L. WILSON and ROBERTA L. WILSON,

Plaintiffs,

vs.

SEARS, ROEBUCK & COMPANY,

Defendant.

MEMORANDUM AND ORDER

(Filed February 7, 1984)

This matter is before the Court upon defendant's motion for judgment notwithstanding the verdict under *Fed. R. Civ. P.* 50(b) (filing 99). Defendant Sears made a motion for a directed verdict at the close of all the evidence. Such motion was not granted. After the return of verdict and judgment thereon, the defendant submitted filing 99.

Since the jury verdict was in favor of the plaintiffs, the facts will be stated in the light of the evidence and the reasonable inferences derived therefrom most favorable to them. *Garoogian v. Medlock*, 592 F.2d 997 (8th Cir. 1979); *Zoll v. Eastern Allamakee Community School District*, 588 F.2d 246 (8th Cir. 1978).

On the evening of November 26, 1977, Ulysses Cribbs, Jr. entered the Club 89 Restaurant and Lounge located in Omaha, Nebraska, and opened fire on the crowd with a 12-gauge pump shotgun he had purchased from Sears, Roe-Buck & Company some five weeks earlier. The plaintiffs were present but were not bruised, cut, scraped, or otherwise abraded by the hail of shotgun fire. They did, however, hear disconcerting sounds and view frightening

events including the death of a close friend. Plaintiff John Wilson, an off-duty deputy sheriff, attempted to shoot Cribbs with his service pistol but was unable to do so.

Plaintiffs then brought suit against Sears alleging that Sears acted negligently in selling the gun to Cribbs. The plaintiffs contended that Sears knew or should have known that Cribbs was dangerous with or likely to misuse a firearm. They offered evidence of violation of the terms of a form promulgated pursuant to regulations of the Bureau of Alcohol, Tobacco and Firearms developed under authority of the Gun Control and Safety Act of 1968. 18 U.S.C. § 1926.

Trial commenced in this matter on November 16, 1983, and the jury returned a verdict in favor of the plaintiffs in the amount of $75,000.00 for John Wilson and $10,000.00 for his wife, Roberta. For the reasons set forth below, the Court deems it proper to set aside the jury's verdict.

The Court concludes that even if Sears was negligent, plaintiffs have not suffered damages that are compensable under Nebraska law. Damages for negligent infliction of emotional distress are only recoverable when such distress results in physical injury manifested by objective symptomatology. *Fournell v. Usher Pest Control,* 208 Neb. 684, 305 N.W.2d 605 (1981); *Owens v. Childrens Memorial Hospital,* 347 F. Supp. 663 (D. Neb. 1972); *see also Restatement (Second) of Torts* § 436A. While the Court will concede that the plaintiffs suffered severe emotional disturbance while present at or as an immediate result of the Club 89 shooting, we find that their injuries are not of the type susceptible of objective determination.

Plaintiffs were diagnosed as suffering from post-traumatic stress disorder. Plaintiffs assert that they suffer from a panoply of anxiety-related ailments, including generalized pain, an inability to concentrate, hyperalertness, diminished sensitivity and intermittent sleeplessness. The only particular ailment relating to a specific portion of the body was John Wilson's chest pains. These pains were first exhibited several years after the shooting. Although one of the physicians testifying at trial attributed these pains to "anxiety," there is simply no evidence that adequately links this episode with the post-traumatic stress disorder. In any event, the plaintiffs stated repeatedly that they did not consider the chest pain to be an important factor. They concede that a symptom (chest pain) arising out of another symptom (anxiety) arising out of a traumatic event (the Club 89 occurrences) is not a condition that supports a recovery.

Plaintiffs contend that their relevant symptoms are those of a person suffering from post-traumatic stress disorder, as shown by an authoritative publication, the Diagnostic Statistical Manual (DSM) III. They further contend that observation of these anxiety related symptoms by physicians and others provides the objective symptomatology necessary for a recovery of damages. However, the fact that attending physicians and friends hear about and observe an emotional state of mind does not transform such complaints and observations into objective findings of physical injury. The Court finds that, of all the symptoms recited, only the chest pains are susceptible to objective verification. Accordingly, under the facts of this case, the traumatic stress disorder and its various manifestations are not compensable.[1]

IT IS HEREBY ORDERED that defendant's motion for judgment notwithstanding the verdict is granted.

IT IS FURTHER ORDERED that the parties' motions to retax costs are hereby rendered moot, and each party shall bear its own costs.

DATED this 6th day of February, 198-.

BY THE COURT:

/s/ C. Arlen Beam
United States District Judge

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[1]To categorize damages resulting from emotional trauma into distinct categories of "physical" and "mental" pain is not to trivialize the latter, but to protect the Court and defendants from exposure to potentially fraudulent claims. *See generally* Prosser, Law of Torts § 54 (4th Ed. 1971).

APPENDIX C

221 Neb. 47

John Lee JAMES and Edna Deloris James, as Parents and Next Friends of Gregory Duwayne James, and as Individuals, Appellants,

v.

John Milton LIEB and Watts Trucking Service, Inc., Appellees.

No. 84-254.

Supreme Court of Nebraska.

Oct. 25, 1985.

Parents brought action against driver and owner of garbage truck on behalf of their son who observed truck strike and kill their daughter, alleging negligent infliction of emotional distress. The District Court, Douglas County, Donald J. Hamilton, J., sustained defendants' demurrer for failure to state a cause of action, and plaintiffs appealed. The Supreme Court, White, J., held that: (1) plaintiff bystander has cause of action for negligently inflicted foreseeable emotional distress upon showing of marital or intimate familial relationship with victim who was seriously injured or killed as a result of proven negligence of defendant, thus, (2) son could recover for negligent infliction of emotional distress even if he was not within "zone of danger" or in fear for his own safety.

Reversed and remanded.

Krivosha, C.J., filed concurring opinion.

Caporale, J., filed dissenting opinion in which Boslaugh and Hastings, J.J., joined.

Syllabus by the Court

1. *Mental Distress: Negligence: Liability.* In a case of bystander recovery for negligent infliction of emotional distress, recovery based on the reasonable foreseeability of the harm is a more logical and just method of determining liability than the "zone of danger" rule.

2. *Mental Distress: Negligence: Liability.* The factors to be considered in determining liability for negligent infliction of emotional distress are not intended to be fixed guidelines but, rather, are factors to be taken into account by the court in assessing the degree of foreseeability of emotional injury to the plaintiff.

3. *Mental Distress: Negligence.* In an action for negligent infliction of emotional distress, negligence must be measured against the particular set of facts and circumstances present in each case.

4. *Mental Distress: Negligence.* In an action for negligent infliction of emotional distress, the relationship between the plaintiff and victim is the most crucial in determining foreseeability.

5. *Mental Distress: Negligence: Proof.* Relationship within a certain degree of consanguinity is not required to prove a sufficient relationship for recovery in an action for negligent infliction of emotional distress.

6. *Mental Distress: Negligence: Proof.* A marital or intimate familial relationship will be required for recovery in an action for negligent infliction of emotional distress. Extended family members will usually have a heavy burden proving a sufficiently close bond to allow recovery.

7. *Mental Distress: Negligence: Proof.* If a plaintiff in a negligent infliction of emotional distress case experiences actual sensory perception of the accident, the requirement of proximity will be satisfied.

8. *Mental Distress: Negligence: Liability.* The determination of liability sustained in a case of negligent infliction of emotional distress depends on a number of factors, including where, when, and how the injury to the victim entered into the consciousness of the plaintiff.

9. *Mental Distress: Negligence.* In a case of negligent infliction of emotional distress, the emotional trauma must result from either death or serious injury to the victim.

10. *Mental Distress: Negligence.* In order to recover in a case of negligent infliction of emotional distress, the plaintiff need not necessarily evidence some concurrent physical injury resulting from the emotional trauma. While concurrent physical injury is highly persuasive, it is not necessary given the current state of medical science and advances in psychology.

David J. Cullan of Cullan, Cullan & Morrison, Omaha, for appellants.

Daniel P. Chesire and Stuart M. Paulson of Kennedy, Holland, DeLacy & Svoboda, Omaha, for appellees.

KRIVOSHA, C.J., and BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

WHITE, Justice.

This is an appeal in a negligence action from an order of the district court for Douglas County sustaining the defendants' demurrer to plaintiffs' petition for failure to state a cause of action.

The following facts were alleged in the petition. On August 10, 1983, plaintiffs' son, Gregory Duwayne James, and their daughter, Demetria, were riding their bicycles

north on 50th Street in Omaha, Nebraska. A garbage truck owned by the defendant Watts Trucking Service, Inc., and driven by its employee, John Milton Lieb, was backing west on Spaulding Street. The truck backed into the intersection of 50th and Spaulding Streets, through a stop sign, and hit and ran over Demetria, killing her. Gregory helplessly watched the entire incident. As a result of witnessing his sister's peril, Gregory became physically ill and suffered, and will continue to suffer, mental anguish and emotional distress.

In ruling on a demurrer we are obligated to accept the plaintiffs' well-pleaded facts, as distinguished from conclusions, as true. *Allen v. County of Lancaster*, 218 Neb. 163, 352 N.W.2d 883 (1984).

[1, 2] The defendants demurred, contending that since plaintiffs' petition failed to allege that Gregory was within the "zone of danger" or in fear for his own safety, no cause of action for emotional distress had been asserted under Nebraska law. Based upon our prior holding in *Fournell v. Usher Pest Control Co.*, 208 Neb. 684, 305 N.W.2d 605 (1981), the trial court dismissed the petition. To the extent that *Fournell* is in conflict with this opinion, it is expressly overruled, and we therefore reverse and remand this cause for further proceedings in accordance with this opinion.

In *Fournell* a young woman and her husband brought suit against a pest control company, alleging negligence concerning a termite inspection of the couple's home. The evidence showed that she had suffered mental and emotional disturbances as a result of discovering termite infestation and damage to her home. The majority in that case

held that under Nebraska law, to state a claim for negligent infliction of emotional distress or trauma, a plaintiff must first show that some type of *physical* injury resulted from the emotional trauma and, secondly, that he or she was within the " 'zone of danger or actually put in fear for his [or her] own safety.' " *Fournell, supra* at 687, 305 N.W.2d at 607. See *Owens v. Childrens Memorial Hospital, Omaha, Nebraska,* 347 F.Supp. 663 (D.Neb.1972). The majority found Mrs. Fournell's petition failing in both regards, claiming damages solely for mental and emotional distress, and affirmed the district court's order of summary judgment for the defendant. Two members of this court joined in dissent. In their opinion mental injury alone should have been compensable, but at the very least the facts of the case showed that plaintiff had suffered a bodily injury from the emotional disturbances as required by Restatement (Second) of Torts § 436 A (1965), adopted by the majority.

Fournell concerned potential recovery by an alleged "direct victim" of the defendant's negligence. The issue of first impression presented to us in this case is whether and under what circumstances a bystander may recover for negligent infliction of emotional distress. The term "bystander" throughout this opinion refers to those persons who are not immediately threatened with physical injury nor placed in fear for their own safety by the defendant's negligence.

Under the "zone of danger" rule followed by this court in *Fournell,* other jurisdictions have allowed bystanders to recover for emotional distress only if they (1) were within a physical "zone of danger," (2) feared for

their own safety, and (3) suffered physically manifested mental or physical injuries as a result of this fear. See, *Tobin v. Grossman*, 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969); *Waube v. Warrington*, 216 Wis. 603, 258 N.W. 497 (1935). However, other "zone of danger" jurisdictions have allowed bystanders to recover damages for "fear for the safety of another," so long as the plaintiff was also at personal risk. See, *Keck v. Jackson*, 122 Ariz. 114, 593 P.2d 668 (1979); *Bowman v. Williams*, 164 Md. 397, 165 A. 182 (1933). The latter view is in accordance with Restatement (Second) of Torts § 436 (1965), which would allow recovery when a family member is within the zone of danger but his or her emotional distress arises from fear for another's safety.

The reasoning behind this exception to the general rule denying recovery for the emotional distress arising from the fear for another is that once the defendant is found to have breached an original duty owing to the plaintiff, he should not be relieved of liability for the resulting unexpected or unusual bodily harm to the plaintiff. The Restatement, *supra* § 436, comment *f.*; Prosser and Keeton on the Law of Torts, *Mental Disturbance* § 54 (5th ed. 1984).

The "zone of danger" rule in general has been defended as a more rational means of determining liability than the "impact" rule which it replaced and which was abandoned by this court in *Rasmussen v. Benson*, 133 Neb. 449, 275 N.W. 674 (1937). The "zone of danger" rule supposedly provided the internal consistency lacking in its precursor. The "impact" rule denied damages for emotional distress unless the plaintiff also suffered a contemporaneous physical impact: an event logically unre-

lated to interest sought to be protected—fear for one's own safety. See, generally, Annot., 64 A.L.R.2d 100 (1959).

Advocates of the "zone of danger" rule also argue that it provides workable, reasonable limits to the liability of a potential defendant. *Stadler v. Cross*, 295 N.W.2d 552 (Minn.1980). "Under the zone-of-danger rule the courts and juries can objectively determine whether plaintiffs were within the zone of danger. Furthermore, plaintiffs can be cross-examined regarding whether their fear was for themselves or for another." *Stadler, supra* at 554. The "zone of danger" rule is currently followed by several jurisdictions. See, generally, Winter, *A Tort in Transition: Negligent Infliction of Mental Distress*, 70 A.B.A.J. 62 (1984).

However, in 1968 the California Supreme Court became the first jurisdiction to abolish the "zone of danger" rule and allow a bystander to recover for negligently inflicted emotional distress in its now landmark decision of *Dillon v. Legg*, 68 Cal.2d 728, 441 P.2d 912, 69 Cal.Rptr. 72 (1968). Since that time, a growing number of jurisdictions have taken another look at this tort and have either adopted or modified the *Dillon* approach and allowed bystander recovery for negligent infliction of emotional distress. See, *Versland v. Caron Transport*, — Mont. —, 671 P.2d 583 (1983); *Apache Ready Mix Co., Inc. v. Creed*, 653 S.W.2d 79 (Tex.App.1983); *Ramirez v. Armstrong*, 100 N.M. 538, 673 P.2d 822 (1983); *Paugh v. Hanks*, 6 Ohio St.3d 72, 451 N.E.2d 759 (1983); *Culbert v. Sampson's Supermarkets Inc.*, 444 A.2d 433 (Me.1982); *Entex, Inc. v. McGuire*, 414 So.2d 437 (Miss.1982); *Barnhill v. Davis*, 300 N.W.2d 104 (Iowa 1981); *Portee v. Jaf-*

fee, 84 N.J. 88, 417 A.2d 521 (1980); *Sinn v. Burd,* 486 Pa. 146, 404 A.2d 672 (1979); *Corso v. Merrill,* 119 N.H. 647, 406 A.2d 300 (1979); *Dziokonski v. Babineau,* 375 Mass. 555, 380 N.E.2d 1295 (1978); *D'Ambro v. United States,* 114 R.I. 643, 338 A.2d 524 (1975); *Leong v. Takasaki,* 55 Haw. 398, 520 P.2d 758 (1974); *Toms v. McConnell,* 45 Mich.App. 647, 207 N.W.2d 140 (1973); *D'Amicol v. Alvarez Shipping Co.,* 31 Conn.Supp. 164, 326 A.2d 129 (1973).

In *Dillon* the plaintiffs, a mother and daughter, both witnessed an accident in which another daughter was struck and killed by a negligent driver. Arguably, the sister of the victim was within the zone of danger; her mother was not. In the view of the California Supreme Court, the facts of *Dillon* illustrated the fallacy of the "zone of danger" rule, which would deny recovery to one plaintiff, the mother, and allow recovery to the daughter. In the court's view, relief for the trauma equally suffered by both plaintiffs upon the apprehension of the child's death should not be based on the happenstance of a few yards. *Dillon, supra.*

At the outset of its discussion the *Dillon* court recognized that any claim for bystander recovery must necessarily be based on the defendant's adjudicated liability and fault for the injury or death of the victim. Without such fault there is no "foundation for the tortfeasor's duty of due care to third parties who, as a consequence of such negligence, sustain emotional trauma." *Dillon, supra* 68 Cal.2d at 733, 441 P.2d at 916, 69 Cal.Rptr. at 76.

> In analyzing the issue the court noted that normally the simple facts of plaintiff's complaint would estab-

> lish a cause of action: the complaint alleges that defendant drove his car (1) negligently, as a (2) proximate result of which plaintiff suffered (3) physical injury. Proof of these facts to a jury leads to recovery in damages; indeed, such a showing represents a classic example of the type of accident with which the law of negligence has been designed to deal.

Dillon, supra at 733-34, 441 P.2d at 916, 69 Cal.Rptr. at 76.

It has been similarly stated that

> [i]n Nebraska, a determination of "proximate cause" consists of three elements: (1) negligence without which injury would not have occurred, (2) injury which is the natural and probable consequence of the negligence and (3) the absence of an efficient, intervening cause breaking the causal connection between the injury and the acts or omissions of negligence.

Petznick v. United States, 575 F.Supp. 698, 709 (D.Neb. 1983).

Quoting from Prosser, the *Dillon* court continued, stating:

> The assertion that liability must nevertheless be denied because defendant bears no "duty" to plaintiff "begs the essential question—whether the plaintiff's interests are entitled to legal protection against the defendant's conduct. . . . It [duty] is a shorthand statement of a conclusion, rather than an aid to analysis in itself. . . . But it should be recognized that 'duty' is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection." (Prosser, Law of Torts, *supra*, at pp. 332-333.)

Dillon v. Legg, 68 Cal.2d 728, 734, 441 P.2d 912, 916, 69 Cal.Rptr. 72, 76 (1968).

The interest worthy of legal protection presented by bystander cases such as the one before us was best described by the New Jersey Supreme Court when it adopted *Dillon:*

> [T]he interest assertedly injured is more than a general interest in emotional tranquility. It is the profound and abiding sentiment of parental love. The knowledge that loved ones are safe and whole is the deepest wellspring of emotional welfare. Against that reassuring background, the flashes of anxiety and disappointment that mar our lives take on safer hues. No loss is greater than the loss of a loved one, and no tragedy is more wrenching than the helpless apprehension of the death or serious injury of one whose very existence is a precious treasure.

Portee v. Jaffee, 84 N.J. 88, 97, 417 A.2d 521, 526 (1980). We find the profound and abiding love for one's sibling to be no less significant.

In its analysis the *Dillon* court reversed its position on the concept of a limited duty precluding liability to a plaintiff outside the zone of physical danger. According to the court, "the chief element in determining whether defendant owes a duty or an obligation to plaintiff is the foreseeability of the risk, that factor will be of prime concern in every case." *Dillon, supra* 68 Cal.2d at 740, 441 P.2d at 920, 69 Cal.Rptr. at 80. The court acknowledged, though, that

> [i]n order to limit the otherwise potentially infinite liability which would follow every negligent act, the law of torts holds defendant amenable only for injuries to others which to defendant at the time were reasonably foreseeable.
>
> In the absence of "overriding policy considerations . . . foreseeability of risk [is] of . . . primary importance in establishing the element of duty."

Dillon, supra at 739, 441 P.2d at 919, 69 Cal.Rptr. at 79.

While recognizing that "no immutable rule" could establish the defendant's duty for every future case, the court suggested the following "guidelines" as aids in resolution of bystander claims:

> (1) Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it. (2) Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence. (3) Whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship.

Dillon, supra at 740-41, 441 P.2d at 920, 69 Cal.Rptr. at 80.

[3] We note that the facts of the instant case squarely fit within these guidelines. While these guidelines have also been called arbitrary, see Prosser and Keeton on the Law of Torts, *Mental Disturbance* § 54 (5th ed. 1984), we believe the *Dillon* approach based upon the reasonable foreseeability of the harm to be a more logical and just method of determining a defendant's liability than the artificial boundaries of recovery drawn by the "zone of danger" rule.

Subsequent California cases have applied these guidelines with varying degrees of strictness. See, *Krouse v. Graham*, 19 Cal.3d 59, 562 P.2d 1022, 137 Cal.Rptr. 863 (1977) (court noted that direct emotional impact from sensory and contemporaneous observance did not require plaintiff to actually see the accident); *Archibald v. Braverman*, 275 Cal.App.2d 253, 79 Cal.Rptr. 723 (1969) (plain-

tiff mother allowed to recover when she *immediately* arrived on the scene *after* the injury); *Jansen v. Children's Hospital Medical Center,* 31 Cal.App.3d 22, 106 Cal.Rptr. 883 (1973) (interpreting *Archibald* as allowing recovery because mother heard explosion and experienced a contemporaneous sensory perception). But see, *Ebarb v. Woodbridge Park Ass'n, Inc.*, 164 Cal.App.3d 781, 210 Cal. Rptr. 751 (1985); *Parsons v. Superior Court for Cty. of Monterey,* 81 Cal.App.3d 506, 146 Cal.Rptr. 495 (1978); *Arauz v. Gerhardt,* 68 Cal.App.3d 937, 137 Cal.Rptr. 619 (1977) (mother denied recovery for arriving at scene after the accident occurred).

Generally, commentators believe, based upon recent cases, that California courts will require strict adherence to and will mechanically apply the *Dillon* guidelines in bystander recovery cases. See, e.g., Diamond, *Dillon v. Legg Revisited: Toward a Unified Theory of Compensating Bystanders and Relatives for Intangible Injuries,* 35 Hastings L.J. 477 (1984); Comment, *Negligent Infliction of Emotional Distress: A proposal for a Recognized Tort Action,* 67 Marq.L.Rev. 557 (1984).

[4, 5] Our review of the *Dillon* line of cases leads us to the same conclusion the Ohio Supreme Court reached: "These factors were not intended to be fixed guidelines with which an aggrieved plaintiff-bystander was required to satisfy in order to recover; rather, the factors were to be taken into account by courts in assessing the degree of foreseeability of emotional injury to the plaintiff." *Paugh v. Hanks,* 6 Ohio St.3d 72, 76, 451 N.E.2d 759, 764 (1983). In an action for negligent infliction of emotional distress, as in any negligence action, "[n]egligence must be measured against the particular set of facts and cir-

cumstances present in each case." *McGinn v. City of Omaha*, 217 Neb. 579, 585, 352 N.W.2d 545, 549 (1984). Accord *Haught v. Maceluch*, 681 F.2d 291 (5th Cir.1982).

We adopt the foreseeability approach of *Dillon*, with the following comments and modifications.

[6] First, of the three *Dillon* factors the relationship between the plaintiff and victim is the most valuable in determining foreseeability, and therefore the most crucial. *Portee v. Jaffee*, 84 N.J. 88, 417 A.2d 521 (1980); *D'Ambra v. United States*, 114 R.I. 643, 338 A.2d 524 (1975). As the Rhode Island Supreme Court stated, "Personal relationship may link people together more tightly, if less tangibly, than any mere physical and chronological proximity." *D'Ambra*, *supra* at 656-57, 338 A.2d at 531. Furthermore, medical authorities are generally in agreement that a mere bystander who has no significant relationship with the victim will not suffer the profound systematic mental and emotional reaction likely to befall a close relative as a result of witnessing or learning of the victim's death. See, Diamond, *supra;* Leibson, *Recovery of Damages for Emotional Distress Caused by Physical Injury to Another*, 15 J.Fam.L. 163 (1977).

[7, 8] To satisfy this factor we choose not to require a relationship within a certain degree of consanguinity, as the Iowa Supreme Court did. *Barnhill v. Davis*, 300 N.W.2d 104 (Iowa 1981). Rather, we will require that there be a marital or intimate familial relationship between the plaintiff and the victim.

This particular facet of *Dillon* was sharply criticized by the court in *Tobin v. Grossman*, 24 N.Y.2d 609, 615, 249 N.E.2d 419, 420, 301 N.Y.S.2d 554, 558 (1969):

> But foreseeability, once recognized, is not so easily limited. Relatives, other than the mother, such as fathers or grandparents, or even other caretakers, equally sensitive and as easily harmed, may be just as foreseeably affected. Hence, foreseeability would, in short order, extend logically to caretakers other than the mother, and ultimately to affected bystanders.

We believe this fear is unfounded. For if we require, as Professor Leibson suggests, "evidence of a close relationship between the plaintiff and the victim, one in which there was a strong bond between the two, it will be apparent that, in most cases involving relatives other than immediate family members, the evidence will not be sufficient to establish such a relationship." Leibson, *supra* at 198. The explanation for this insufficiency, according to Leibson, lies in the nature of our modern families. Today the extended family often has limited involvement in day-to-day activities of other family members and relatives and, therefore, would not typically possess the strong bond necessary to meet the test.

Our holding would not eliminate aunts, uncles, and grandparents from the class of potential plaintiffs, but would place upon them a heavier burden of proving a significant attachment.

[9] Second, we address the factor that plaintiff's shock result from a "sensory and contemporaneous observance of the accident." No other aspect of the *Dillon* decision has drawn more attention than this factor. We agree with the observation of the Montana Supreme Court that if a "plaintiff is required to experience actual sensory perception of the accident, the requirement of proximity is necessarily satisfied." *Versland v. Caron Transport*,

— Mont. —, —, 671 P.2d 583, 586 (1983). It has been suggested that the requirements of physical proximity and "contemporaneous observation" impugn the integrity of the *Dillon* approach and that *Dillon* has merely replaced the arbitrary spatial boundary of the "zone of danger" rule with an arbitrary temporal boundary. See Diamond, *Dillon v. Legg Revisited: Toward a Unified Theory of Compensating Bystanders and Relatives for Intangible Injuries*, 35 Hastings L.J. 477 (1984).

It is true in cases such as the one before us that the contemporaneous observation guideline would serve to assure the minds of a jury that the emotional injury is serious. However, if a sufficiently close relationship exists, the psychological reaction of the plaintiff in many cases could be the same or perhaps worse upon the hearing of the loss. See Leibson, *supra*.

Rather, this guideline is in effect a policy consideration concerning the extent of the defendant's liability. As one court has stated, "Without such perception, the threat of emotional injury is lessened and the justification for liability is fatally weakened. The law of negligence, while it redresses suffering wrongfully caused by others, must not itself inflict undue harm by imposing an unreasonably excessive measure of liability." *Portee v. Jaffee*, 84 N.J. 88, 99, 417 A.2d 521, 527 (1980).

[10] We believe that the Massachusetts Supreme Court has a better perspective on this criterion. The determination of liability for the injury sustained "depends on a number of factors, such as where, when, and how the injury, to the third person entered into the consciousness of the claimant, and what degree there was of familial or

other relationship. . . ." *Dziokonski v. Babineau,* 375 Mass. 555, 568, 380 N.E.2d 1295, 1302 (1978).

> A plaintiff who rushes onto the accident scene and finds a loved one injured has no greater entitlement to compensation for that shock than a plaintiff who rushes instead to the hospital. So long as the shock follows closely on the heels of the accident, the two types of injury are equally foreseeable.

Ferriter v. Daniel O'Connell's Sons, Inc., 381 Mass. 507, 518, 413 N.E.2d 690, 697 (1980).

[11] In addition to proving a sufficiently close relationship, we hold that the emotional trauma, the foreseeable harm to be redressed, must result from either death or serious injury to the victim. While minor injuries to a loved one may trigger emotions of sorrow and anxiety, these emotions pale in comparison to the profound grief, fright, and shock experienced following an accidental death or serious injury. See, *Portee v. Jaffee, supra; Ramirez v. Armstrong,* 100 N.M. 538, 673 P.2d 822 (1983).

[12] Before concluding, we must also address the further requirement of a cause of action for emotional distress in *Fournell v. Usher Pest Control Co.,* 208 Neb. 684, 305 N.W.2d 605 (1981), that plaintiff must evidence some concurrent physical injury resulting from the emotional trauma. Other courts adopting the *Dillon* approach, to a certain degree, have retained this feature of the "zone of danger" rule. See, e.g., *Ramirez v. Armstrong, supra; Barnhill v. Davis,* 300 N.W.2d 104 (Iowa 1981); *Corso v. Merrill,* 119 N.H. 647, 406 A.2d 300 (1979). We now reject this requirement for many of the reasons stated in the Chief Justice's dissent in *Fournell, supra* at 697, 305

N.W.2d at 611: "To . . . require that, before one who is mentally injured may recover, he must at least regurgitate once seems . . . to be imposing upon the law a requirement that makes little or no sense."

Ostensibly, the problem in this area is of proving to a jury that a reasonable person in the position of the bystander plaintiff has suffered a compensable injury. While physical manifestation of the psychological injury may be highly persuasive, such proof is not necessary given the current state of medical science and advances in psychology. There are primarily three problems with this requirement: (1) It is overinclusive, since it could possibly lead to recovery for trivial claims of mental distress accompanied by physical symptoms; (2) It is underinclusive, since serious distress is arbitrarily deemed not compensable if not accompanied by physical symptoms; and (3) It encourages extravagant pleadings and distorted testimony. See, *Molien v. Kaiser Foundation Hospitals,* 27 Cal.3d 916, 616 P.2d 813, 167 Cal.Rptr. 831 (1980); *Culbert v. Sampson's Supermarkets Inc.,* 444 A.2d 433 (Me.1982); *Sinn v. Burd,* 486 Pa. 146, 404 A.2d 672 (1979); *Paugh v. Hanks,* 6 Ohio St.3d 72, 451 N.E.2d 759 (1983).

In reaching our decision we are not unmindful of the several policy arguments advanced against the cause of action we have adopted. Typically, opponents of expanding liability in this area contend that (1) bystander recovery will inundate the courts with fictitious injuries and fraudulent claims; (2) courts will be deluged with a flood of litigation; (3) bystander recovery will unduly burden defendants with undue liability; and (4) once recognized, liability cannot reasonably be restrained. Each of these

arguments have been adequately reflected by other courts. See, *Sinn v. Burd, supra; Culbert v. Sampson's Supermarkets Inc., supra.* We add the following comments.

First, even courts opposed to recognizing this cause of action have acknowledged that the fear of fraudulent claims alone is an insufficient reason to deny all such claims. See *Tobin v. Grossman,* 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969). Furthermore, the "zone of danger" rule also carries with it the risk of fraudulent claims. "It is not hard to imagine plaintiffs and their attorneys falsely alleging that the claimant was in some small way injured by the defendant's negligence, or was within the zone of danger in order to present a valid cause of action." Leibson, *Recovery of Damages for Emotional Distress Caused by Physical Injury to Another,* 15 J.Fam.L. 163, 174 (1977). Also, it is not unlikely that under a "zone of danger" rule plaintiffs would carefully draft pleadings so as to vaguely present a factual question that the plaintiff was also in peril. Leibson, *supra.*

Second, taking California as an example, experience shows that its courts have not been overwhelmed with litigation in this area. See *Ramirez v. Armstrong,* 100 N.M. 538, 673 P.2d 822 (1983).

Third, the "dollars and cents" argument that society cannot afford the costs that will ensue from recognizing liability for the demonstrable injury of emotional distress naturally resulting from defendant's negligent act has been aptly dispelled. See *D'Ambra v. United States,* 114 R.I. 643, 338 A.2d 524 (1975). The possibility of increased insurance costs alone should not deny recovery for an otherwise valid claim.

Finally, we are not delayed by the specter that recognizing a cause of action for bystander recovery will naturally entail liability to every acquaintance of the victim. As we have emphasized, the class of bystanders limited to those with a marital or intimate familial status will sufficiently circumscribe the defendant's liability.

[13] In summary, we hold that a plaintiff bystander has a cause of action for negligently inflicted foreseeable emotional distress upon a showing of marital or intimate familial relationship with a victim who was seriously injured or killed as a result of the proven negligence of a defendant. We thus find error in the district court's order sustaining the defendants' demurrer.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

KRIVOSHA, Chief Justice, concurring.

I am in complete agreement with the majority in this case. I write separately because I believe that our decision in the instant case has not only moved us from the "zone of danger" rule to a modified "foreseeability" rule in cases of this nature but also stands for the proposition that from this point forward one in Nebraska may recover for emotional distress proximately caused by the defendant's negligence even if no physical injury is sustained.

CAPORALE, Justice, dissenting.

I dissent. In the past, Nebraskans were required to bear the cost of compensating one's physically manifested fear for his or her own safety. *Fournell v. Usher Pest Control Co.*, 208 Neb. 684, 305 N.W.2d 605 (1981). Now, Nebraskans are required to bear the more onerous cost of

compensating one's psychic pain over the injury of another.

Contrary to the view of the majority, the "dollars and cents" argument has not been dispelled, at least not for me. The harsh reality is that there are societal costs to compensating for accidents; the greater the number of elements of damage, the greater are those costs. See G. Calabresi, The Costs of Accidents, A Legal and Economic Analysis 22, 23, 26, 27, 215-25 (1977). I find nothing in the record before us, or the majority opinion, which deals with those arguments other than the bald assertion that they have been "aptly dispelled." The case to which the majority opinion cites as supporting that statement, *D'Ambra v. United States,* 114 R.I. 643, 338 A.2d 524 (1975), does nothing of the sort. The *D'Ambra* opinion makes it quite clear that, in the judgment of that court, the economic policy issues were "no bar to an extension of potential liability." *Id.* at 654, 338 A.2d at 530. That approach, I respectfully suggest, dispels nothing; the costs are still there.

Of course, Nebraska's earlier "zone of danger" rule was arbitrary, but the "bystander recovery" rule is no less so. Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm—A Comment on the Nature of Arbitrary Rules,* 34 U.Fla.L.Rev. 477 (1982). The "zone of danger" rule at least had the virtue of being susceptible to more objective proof.

That observation leads to another concern. The dispersive nature of the majority opinion, and the Chief Justice's concurring opinion, leaves me with no clear notion of what the majority envisions the limits of the rule

to be. I recognize that the opinion must be read in the context of the facts pled in this case, but I respectfully suggest that the matter would have been left in a less confusing state if the majority opinion had limited itself to a consideration of those facts.

I would have affirmed the district court's order of dismissal.

BOSLAUGH and HASTINGS, J.J., join in this dissent.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 1314

John L. Wilson and Roberta L. Wilson,
Husband and Wife,

Appellants,

vs.

Sears, Roebuck and Co.,
a New York Corporation,

Appellee.

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING

COME NOW the Petitioners, John L. and Roberta L. Wilson, and move this Court for leave to file a second petition for rehearing in the above-captioned matter pursuant to Rule 40 of the Federal Rules of Appellate Procedure. Petitioners show to the Court that the above-captioned matter was considered by this Court and that on March 20, 1985, this Court entered a judgment and decision affirming the lower court's decision and dismissing the Petitioners' case. Petitioners further show to the Court that a timely Petition for rehearing was filed along with a motion requesting certification of the issue before this Court to the Nebraska Supreme Court. The petition for rehearing and motion were denied by Order of the Court dated August 14, 1985. Subsequent to that date on October 25, 1985, the Supreme Court of Nebraska, in the case of *John Lee James, et al. v. John Milton Lieb*, 221 Neb. 47, — N.W.2d — (October 25, 1985),

made a declarative determination of the substantive law of Nebraska such that the interpretation of the same state's substantive law by this Court is in direct and irreconcilable conflict with that of the Nebraska Supreme Court. That this entire case rests upon the sole issue as determined by the Nebraska Supreme Court and that the interest of justice, fairness, and lawful application of state substantive law require consideration of this matter by the Court.

WHEREFORE, Petitioners move the Court for leave to file a petition for rehearing in this matter.

JOHN L. WILSON AND
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Husband and Wife,
Petitioners,

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-1314

John L. Wilson and Roberta L. Wilson,
Husband and Wife,

Appellants,

vs.

Sears, Roebuck and Co.,
a New York Corporation,

Appellee.

SECOND PETITION FOR REHEARING

COME NOW the Petitioners, John L. and Roberta L. Wilson, and petition the court for rehearing in this matter for the reason that this Court has misapprehended the substantive state law of Nebraska as conclusively determined by the highest court of the State of Nebraska. Petitioners further show to the Court that the determination by this Court of the issue before the Court, as set forth in *Wilson v. Sears,* 757 F.2d 948 (8th Cir. 1985), was based solely on this Court's determination that "the state's highest court *requires physical injury* and that emotional disturbance and distress alone are not sufficient to establish a right to recover. . . ." (*Wilson,* supra, at 951, emphasis added). That for reasons more fully set forth in the Brief in this matter, it has been conclusively determined by the Nebraska Supreme Court that the requirement of "physical injury" has been rejected. *James v. Lieb,* 221 Neb. 47, — N.W.2d — (October 25, 1985), at page 58. Petitioners further assert that this Court should correct the misapplication of state substantive law in the

above-captioned matter pursuant to 28 U.S. Code Section 1652, the Rules of Decision Act, and in accordance with such other applicable rules, decisions, or statutes.

WHEREFORE, Petitioners move the Court for rehearing in the above-captioned matter, or in the alternative, for summary reversal and reinstatement of the verdict entered by the jury below pursuant to Rule 60(b) of the Federal Rules of Civil Procedure.

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